

Supreme Court, U.S.
FILED

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No.

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In the William K. Sutar, Clerk

Supreme Court of the United States

PATRICK H. OTTERSON,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

corrected dated
On Petition For A Writ Of Certiorari
To The Superior Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Superior Court of Pennsylvania once again affirmed the Court of Common Pleas of Montgomery County's decision refusing to grant suppression of evidence seized as a result of the execution of search warrants after the Supreme Court of Pennsylvania granted the Petitioner's previous Petition for allowance of Appeal and ordered the Superior Court's original 2 to 1 decision vacated, and remanded the matter back to the Superior Court for consideration in light of *Commonwealth v. Torres*, 764 A.2d 532 (2001). In *Torres*, the search warrant failed to establish probable cause under the requirements of the Fourth Amendment to our United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution because the Affidavit of Probable Cause did not establish the basis of knowledge or veracity of the anonymous sources or make a showing of the reliability of the information that they relayed to the police; furthermore, there was no police corroboration of criminal conduct.

1. Did the Superior Court of Pennsylvania err in their decision affirming the Lower Court's ruling which conflicts with the standards set forth in the Fourth Amendment to our United States Constitution as well as Article 1 Section 8 of the Pennsylvania Constitution in that the tips from anonymous sources did not provide sufficient probable cause to issue the primary search warrant in absence of corroborating evidence for Warren Street, Norristown, Pennsylvania?

**QUESTIONS PRESENTED
FOR REVIEW – Continued**

2. Was the subsequent search warrant at Sterigere Street, Norristown, Pennsylvania fruit of the poisonous tree inasmuch as it was based upon information derived from the illegal search and arrest at the West Warren Street property and which was not supported by independent probable cause?

LIST OF PARTIES

1. Petitioner, Patrick H. Otterson, is an inmate currently confined at SCI Coal Township, 1 Kelley Drive, Coal Township, Pennsylvania 17866.
2. Respondent, Commonwealth of Pennsylvania, is represented by the Montgomery County District Attorney's Office, Airy & Swede Streets, Norristown, Pennsylvania:

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OPINION TO BE REVIEWED

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

The Order of the highest state Court, the Supreme Court of Pennsylvania, to review the merits; appears at App. 27 to the Petition and is reported at 941 A.2d 1255.

The Opinion of the Superior Court of Pennsylvania appears at App. 1 to the Petition and is reported at 947 A.2d 1239.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment of the United States Constitution.

Article 1 Section 8 of the Pennsylvania Constitution.

Pennsylvania Rules of Criminal Procedure:

Pa.R.Cr.P. 203, 42 Pa. C.S.A. – Requirements for issuance of a Search Warrant

Pa.R.Cr.P. 205, 42 Pa. C.S.A. – Contents of Search Warrant

Pa.R.Cr.P. 206, 42 Pa. C.S.A. – Contents of Application for Search Warrant

JURISDICTION

The date on which the Superior Court of Pennsylvania decided my case on remand was April 29, 2008. A copy of that decision appears at App. 1.

A timely second Petition for Allowance of Appeal was thereafter denied on October 7, 2008. A copy of the order denying rehearing appears at App. 79.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Petitioner, Patrick H. Otterson, seeks review in a direct appeal from a judgment of sentence from the Court of Common Pleas of Montgomery County, Pennsylvania, as per Criminal Docket No. 9849-2004. Petitioner is presently incarcerated at the State Correctional Institution at Coal Township, Pennsylvania, serving a sentence imposed upon him by the Honorable Richard Hodgson, Judge of the Court of Common Pleas of Montgomery County, on July 20, 2006.

Petitioner was convicted of having violated the Controlled Substance Act for possession and manufacture of marijuana plants between October 27, 2004 and October 29, 2004 at Warren Street, Norristown, PA, and between October 29, 2004 and October 30, 2004 at Sterigere Street, Norristown, PA. In addition, Petitioner was also convicted of the same counts between March 5, 2003 and October 30, 2004 at both locations.

These charges arose from the execution of a search warrant on October 27, 2004 at Warren Street, Norristown, PA. As a result of the seizure of marijuana

plants and other information, the police obtained a search warrant for the address on Sterigere Street and seized additional marijuana plants.

A Motion to Suppress was timely filed. The constitutionality of the warrants was challenged at the suppression hearing on November 3, 2005, before the Honorable William T. Nicholas, where Petitioner's counsel submitted to the Court "that there is no way that these search warrants can pass constitutional muster, either under the Fourth Amendment of the United States Constitution or under the Pennsylvania Constitution" (N.T. 11/3/05 pages 37, 80). Petitioner's counsel argued "that there was insufficient probable cause to issue the warrant at Warren Street in that the tips from the anonymous and confidential sources were not corroborated by the police,¹ their reliability is not established (N.T.

¹ During the suppression hearing, Petitioner's counsel asserted "that the three anonymous females must be presumed one and the same," in which Judge Nicholas resolves, "even if it is the same female, it is someone other than the resident, so you have two sources, at least two sources" (N.T. 11/3/05 page 64). The District Attorney expressed to Judge Nicholas, "the number of sources would actually be three," which Petitioner's counsel agreed (N.T. 11/3/05 page 87). However, on pages 5-6 of Judge Nicholas' Opinion (App. 64), in his Findings of Fact No. 4, No. 5 and No. 6, Judge Nicholas rationalized that there were three anonymous informants and four confidential informants who served to corroborate each other in which he cites *Commonwealth v. Karns*, 566 A.2d 615 (Pa. Super. 1989). Petitioner contends that the three "anonymous females" are in fact one anonymous female and that there is no way of discerning whether this female is not one of the confidential sources who appear to be

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11/3/05 pages 51-80), and the information the sources relayed to the police was stale in that it contained no time frame when the observations were made" (N.T. 11/3/05 pages 51-80, 176-182); furthermore, he emphasized "Pennsylvania does not have a 'Good Faith' exception that we recognize with regard to our search warrants" (N.T. 11/3/05 pages 75, 172). Petitioner's counsel then argued "that if the Warren Street warrant falls, everything falls, (N.T. 11/3/05 pages 49-50) because the search at Sterigere Street is fruit of the poisonous tree (N.T. 11/3/05 pages 46, 81-83) in that Petitioner's arrest and statement are fruits of the illegal search at Warren Street"² (N.T. 11/3/05 pages 81-83, 161-173). He further added "that the police trespassed when making observations at Sterigere Street during an ongoing investigation without a warrant" (N.T. 11/3/05 pages 46-49, 175-176). The

working with each other in providing information to the police and therefore they were not "independent" and do not corroborate each other.

² On page 8 of Judge Nicholas' Opinion (App. 64) he states "We credit the suppression hearing testimony of Detective Altieri over that of the defendant on the question of whether the defendant was told that if he gave a statement, the police would not charge his girlfriend, Tammy Taylor." Yet, when Detective Altieri was asked by Petitioner's counsel, "And did you have a discussion with Mr. Otterson prior to taking the statement from him that you wouldn't charge Tammy Taylor with regard to the marijuana if he acknowledged that the marijuana in both the car and residence was his?," the Detective responded "I may have, sure. I don't want to charge someone who doesn't have involvement with a crime." (N.T. 11/3/05 page 108).

Honorable William Nicholas denied that motion by Order dated December 5, 2005 (App. 64).

The case was called to trial on March 29, 30, 2006 before the Honorable Richard Hodgson, sitting without a jury. In his Opinion, Judge Hodgson adopted the reasoning of the Honorable William Nicholas (App. 52). At the conclusion of the trial, Petitioner was found guilty of three Violations of the Controlled Substance Act and for Violations of the Uniform Firearms Act (VUFA).³ Judge Hodgson

³ The firearms seized during the subsequent search at the Sterigere Street property were not listed as "items to be seized" on the face of the Sterigere Street Warrant, nor were firearms mentioned anywhere in the Affidavit, which is a requirement of Pa.R.Cr.P. 205 and 206. Furthermore, the police had no reason to believe that the firearms would have been illegal or illegally possessed at the time of executing the search warrant. Nothing showed up on the NCIC check (N.T. 11/3/05 pages 14-15) in the Affidavit of the primary search warrant for Warren Street on pages 4-5, nor was there any information provided anywhere in either warrant that suggested that it was illegal for Petitioner to possess firearms.

Petitioner was not charged for the double barrel shotgun mentioned on page 6 of Judge Lally-Green's Opinion (App. 1), which was an old inoperable shotgun used as an ornament for above the fireplace (N.T. 3/29-30/06 page 72). Petitioner was charged for a .22 caliber Ruger target rifle legally purchased by Petitioner many years before an incident in New Jersey where Petitioner broke a man's nose in a fight for which he plead out to 30 days in jail to be served on weekends in Cape May County, New Jersey, followed by probation (N.T. 3/29-30/06 page 23). Petitioner was not aware that he was no longer allowed to possess firearms. There was also a Glock pistol which was one of Petitioner's Father's guns that was legally owned and registered to his Father at that address where Petitioner's Father lived

(Continued on following page)

sentenced Petitioner on July 20, 2006 to a term of not less than five years on the main Bill as well as concurrent terms of five years on Bill 9849.1 and 3-5 years on Bill 9849.2. A consecutive term of 1-5 years imprisonment was imposed with respect to the VUFA offense. Bail was revoked and Petitioner was sent to prison on that date.

A Notice of Appeal was filed on July 25, 2006 with the Superior Court of Pennsylvania. The Statement of the Questions Involved are as follows: 1. Did the lower Court err in denying the Petitioner's Motion to Suppress Evidence seized as the result of an execution of a search warrant which lacked probable cause for Warren Street, Norristown, PA? 2. Did the lower Court err in denying the Petitioner's Motion to Suppress Evidence seized at Sterigere Street, Norristown, PA, which was tainted by the illegal search and seizure conducted at Warren Street and which was not supported by independent and lawfully acquired probable cause? 3. Was the evidence insufficient as a matter of law to establish Petitioner's guilt beyond a reasonable doubt on Bill 9849.2 where the prosecution did not establish that a corpus delicti existed as to this offense?

until early 2004 (N.T. 1/26/05 pages 61-69). The pistol was among things left by Petitioner's Father that he had not yet picked up from when he moved (N.T. 3/29-30 pages 63-64).

Petitioner's counsel argued that the warrants were obtained in violation of Petitioner's federal and state constitutional rights to be free from unreasonable searches and seizures in the respect that there was not constitutionally sufficient probable cause within the four corners of each Affidavit. The warrant for Warren Street was not supported by sufficient probable cause as it was based upon anonymous tipsters with no record of previous reliability, whose information was not corroborated by police investigation other than noncriminal general facts. The informants did not even offer how they would have acquired their knowledge. The warrant should have been suppressed and therefore the second warrant for Sterigere Street should have been suppressed as the fruit of the poisonous tree inasmuch as it was based upon information derived from the illegal search at Warren Street. The Sterigere Street Warrant was not supported by independent probable cause and contained information unlawfully acquired when the police invaded the curtilage of Petitioner's property to obtain information for the warrant. Petitioner's counsel also argued that the Commonwealth failed to present sufficient evidence of Petitioner's guilt with respect to Bill 9849.2 charging Petitioner with violating the Controlled Substance Act for possession and manufacture of marijuana plants between March 5, 2003 and October 30, 2004 in the respect that the prosecution failed to prove beyond a reasonable doubt that there was a corpus delicti, as to this offense existing independent of Petitioner's oral and written

admissions as no marijuana was recovered to support this charge.

The matter was heard in an oral argument on February 14, 2007 before a panel of the Superior Court Judges, Lally-Green, Gantman and Popovich, as per No. 1968 EDA 2006. On August 21, 2007 a Memorandum Opinion was issued on behalf of Judges Lally-Green and Gantman (App. 29), with Judge Popovich issuing a Dissenting Memorandum (App. 29). Judges Lally-Green and Gantman adopted Judge Nicholas' analysis of the suppression hearing as their own (App. 29).

In Judge Popovich's Dissenting Memorandum (App. 29), he asserts that Affidavit for Warren Street fails to show the reliability of the informants on its face and the only facts corroborated by the police were noncriminal in nature, were easily obtained by the police, and do not point with a high degree of probability that Petitioner was engaged in a marijuana growing operation (App. 29). Judge Popovich found that the tips from the anonymous "concerned citizens" and the tips from the confidential sources presented information that was substantially similar to each other. Based on the similarity of these tips he was led to the conclusion that these tips provided information that could have been obtained easily by the police and were therefore, not sufficient to form the basis for a warrant (App. 29). Judge Popovich concluded that the evidence obtained from the Sterigere Street property was the fruit of the search and arrest at the Warren Street property. Based upon his

finding that all of the evidence obtained from Petitioner's arrest and statement following the illegal search of the Warren Street property should have been suppressed, Judge Popovich would reverse the case and would not reach Petitioner's third issue (App. 29).

Petitioner's counsel filed an Application for Reargument En Banc with the Superior Court of Pennsylvania on September 4, 2007 which was denied by Order dated October 19, 2007 (App. 28).

On November 19, 2007 Petitioner's counsel, filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania as per No. 961 MAL 2007. "The Statement of the Issues Presented for Review," was: Did the lower Courts err in refusing to grant suppression of evidence seized as a result of the execution of search warrants in Montgomery County which lacked probable cause and/or were tainted by the initial illegal search and seizure? Petitioner's counsel argued the same points as before in the original appeal. In addition, Petitioner's counsel challenged the ruling of the Superior Court (App. 29). By Order dated December 28, 2007 (App. 27), the Supreme Court of Pennsylvania granted the Petition for Allowance of Appeal and vacated the Order of the Superior Court, remanding the case to that Court for consideration in light of *Commonwealth v. Torres*, 764 A.2d 532 (Pa. 2001).

The same three-judge panel that had heard this case in the first round of appellate activity before the Superior Court, Judges Lally-Green, Gantman and Popovich were once again assigned to this case. No new oral argument was scheduled, although supplemental briefs were filed on February 26, 2008. That panel issued an Opinion authored by Judge Lally-Green on April 29, 2008 (App. 1), once again affirming the ruling of the lower Court.

Petitioner's counsel filed another Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on May 20, 2008 as per No. 312 MAL 2008. The "Statement of the Issues Presented for Review," was: Did the Superior Court fail to follow the Supreme Court of Pennsylvania's decision in refusing to grant suppression of evidence seized as a result of the execution of search warrants in Montgomery County, which lacked probable cause and/or were tainted by the initial illegal search and seizure? That Petition was denied by Order dated October 7, 2008 (App. 79).

REASONS FOR GRANTING THE PETITION

On December 28, 2007, the Supreme Court of Pennsylvania granted Petitioner's previous Petition for Allowance of Appeal. In their Order (App. 27), the Supreme Court of Pennsylvania vacated the ruling of the Superior Court (App. 29) and remanded the matter to that Court for consideration in light of *Commonwealth v. Torres*, 764 A.2d 532 (Pa. 2001).

Thereafter, the same three-judge panel that had initially ruled on this case issued a new Opinion (App. 1), this time authored by Judge Lally-Green, once again affirming the judgment of sentence.

In that first Opinion (App. 29), the Panel of the Superior Court provided no analysis at all of Petitioner's claim that the search warrant for Warren Street, was constitutionally deficient in that it lacked probable cause to support its issuance under *Illinois v. Gates*, 462 U.S. 213 (1983) and *Commonwealth v. Torres, supra*. The panel merely adopted the Suppression Court's ruling (App. 29).

In his Dissenting Memorandum (App. 29), Judge Popovich declared that he would have suppressed the evidence obtained from the search of the Warren Street and Sterigere Street properties. Judge Popovich reasoned that the four corners of the Affidavit for the Warren Street property failed to sufficiently demonstrate that the anonymous sources had a basis of knowledge regarding Petitioner's alleged criminal activity inside that location and also failed to establish their reliability. Judge Popovich emphasized that the police provided corroboration only as to facts that were noncriminal in nature, could have been easily obtained by the police and did not offer incriminatory information regarding Petitioner having been engaged in a marijuana growing operation. Judge Popovich also rejected the Commonwealth's argument that the tips from the anonymous or confidential

sources could have provided self-corroboration since they were substantially similar to each other and could have been obtained easily by the police (App. 29).

In the Opinion of Judge Lally-Green (App. 1), there is now a more full and extensive review of Petitioner's claim regarding the probable cause issue. Nevertheless the Panel continued to adhere to the view that there was a substantial basis for the issuing authority to have found probable cause to support the search warrants. Petitioner respectfully disagrees and contends that his United States constitutional and Pennsylvania constitutional right to be free from unreasonable searches and seizures was violated.

On page 16 of Judge Lally-Green's Opinion (App. 1) she states,

Here, unlike in *Torres*, the Affidavit in question provided information regarding the basis of the confidential sources' knowledge. For example, the Affidavit specifically provided that one of the confidential sources told the affiant that he/she smelled "skunk weed", and another source said they saw marijuana growing inside the Warren Street property.

However, the Affidavit does not provide how or when the sources would have come about in making their observations or offer their expertise on how they would know what marijuana looks or smells like. The source that claimed they saw marijuana growing

inside the property does not even give an actual description of the alleged observation. In fact, on page 3 of the Warren Street Affidavit in the original tip, the source stated "that he/she has seen several marijuana plants growing in pots in the first floor, inside that residence." However, when the police executed the search warrant, all of the marijuana was found growing on the second floor (N.T. 1/26/05 page 36), which was equipped to grow marijuana, where there were 64 plants (N.T. 3/29/06 page 31), which is a number that is not associated with **several**. The police do not corroborate either tip nor do they confirm "several marijuana plants growing in the first floor" after executing the warrant.

On pages 16-17 of her Opinion (App. 1) Judge Lally-Green states,

In addition, the veracity of the sources' information was corroborated by independent police investigation. After the first anonymous tip on August 31, 2004,⁴ multiple law enforcement officers began periodic checks of the property. They saw the property as multiple sources described it with windows covered and air conditioning units running inside. Furthermore the officers attempted to conduct a thermal imaging scan of the property. Although the scan provided inconclusive

⁴ The Affidavit for Warren Street does not specify a date when the tip was provided by the source, only when the tip was relayed to Detective Altieri from Detective Kelly.

results, it did reveal air conditioning units running inside the property in the cold weather,⁵ as multiple sources had indicated to police.

However, there is only one tip that the occupant of the property covered the windows which was provided by the final anonymous subject on page 9 of the Warren Street Affidavit. The police spoke to this source on October 27, 2004, the same date the warrant was issued and executed so there is no way that the independent police investigation could have corroborated this tip. This source stated, "that after the police were 'snooping' around in late August, the occupant showed up shortly after that and cleaned up overgrown weeds in the rear of the property and also covered up the windows more thoroughly so no one could see inside." Coincidentally, Detective Altieri went to the property on August 31, 2004 where he spoke to a resident (Warren Street Affidavit, page 3). This was most likely the same person due to the fact that the only way this source would have known that the police were "snooping" around is if Detective Altieri introduced himself because he is a plainclothes Narcotics Detective that also works in an undercover capacity (Sterigere Street Affidavit, page 2).

There were two tips that the air conditioners were operating on a timer (Warren Street Warrant

⁵ At the suppression hearing trial counsel established, "that these units could just as well have been dual purpose heating/cooling units" (N.T. 11/3/05 pages 25-29, 54-55).

pages 6, 9). The latter tip on page 9, which is the final anonymous subject again, stated "the air conditioners still go on the same time every night," suggesting that they provided this information before. Therefore, it is more than likely that this is the same source as the anonymous female from September 16, 2004 who also reported this on page 6 of the Affidavit, or that they are working together. The police do not corroborate that the air conditioners are operating on a timer. They only observe them running. Petitioner submits that it is more than likely that there are only two sources and that they are working with each other in providing information to the police.

Judge Lally-Green on page 17 of her Opinion (App. 1) then states,

While the information that the officers corroborated was not necessarily criminal in nature, it was consistent with a marijuana growing operation. Finally, the information that was corroborated by the officers in this case was not "publicly available" in the same sense as the information corroborated by the affiant in *Torres*, who simply corroborated the source by looking in the phone book.

Petitioner contends that seeing blinds and curtains completely closed and hearing air conditioning (or heating) units running which could be observed standing on the public sidewalk in front of the property was "publicly available" information just like in

Torres and that this does not qualify the veracity of the sources.

In *Commonwealth v. Torres, supra*, the Supreme Court of Pennsylvania held that the basis of knowledge and the veracity of the Affiant's anonymous sources are factors to be considered in making a probable cause determination, and that these factors continue to retain a vital role in cases where the Affidavit of Probable Cause is almost entirely based upon information gleaned from anonymous sources. In *Torres*, there was no attempt to establish either prong and therefore, "a strong showing of the reliability of the information" relayed to the police would be required. *Id.* at 540. Importantly, in Footnote 8, the Court noted that limited corroboration of general information provided by the informant is not sufficient to sustain the warrant. See Article 1 Section 8 of the Pennsylvania Constitution, as well as U.S.C.A. Constitution Amendment 4. The Court concluded that the Affidavit of Probable Cause in that case failed to provide a substantial basis upon which to issue a warrant to search that defendant's apartment. In accord is *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), where the Supreme Court of Pennsylvania found that an Affidavit for a search warrant lacked probable cause because the one fact which would have directly suggested criminal conduct (marijuana growing near premises) was not confirmed by the police, who were only able to confirm facts of a general and noncriminal nature. Because these facts were "thin" and equally consistent with noncriminal

as well as criminal conduct, the warrant was disapproved. In accordance with Pennsylvania law, there is no "good faith" exception to the exclusionary rule. See *Torres, supra*, at 540 and *Edmunds, supra*, at 903-906.

The Affidavit for Warren Street failed to qualify the anonymous sources' basis of knowledge and veracity as well as the reliability of the tips to the police, which was the case in *Torres*. The police investigation was only able to corroborate facts that were general and noncriminal in nature just like in *Edmunds*. The tips provided no predictive conduct or information that would provide police with means to test the informant's knowledge or credibility as the tip in *Gates* provided. All the police had to rely on was bare reports from unknown, unaccountable informants who neither explained how or when they made their observations nor supplied any basis for believing they had inside information. See *U.S. v. Wells*, 223 F.3d 835 (C.A. 8, 2000) (Anonymous tip itself insufficient); *U.S. v. Fields*, 182 F.Supp.2d 575 (E.D. Tex. 2002) (Generalized uncorroborated statements of an unidentified informant are insufficient to establish probable cause, even according great deference to the issuing magistrate's determination. Furthermore, suppressing evidence in this case properly effectuates the purpose of the exclusionary rule of deterring unlawful police conduct.)

The fact that the police discovered marijuana as a result of executing the search warrant at Warren Street does not imply that the police had provided

sufficient probable cause in the Affidavit to support the issuance of the search warrant. In *Florida v. J.L.*, 120 S.Ct. 1375, 1379 (2000), the Supreme Court of the United States held: "That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting *J.L.* of engaging in unlawful conduct."

A review of the primary Affidavit Search Warrant for Warren Street shows that probable cause was lacking here. On page 3, the Affidavit begins with August 31, 2004, when the Affiant, Officer Eugene Parsley, reports that a detective has received information from another detective that was provided by a "confidential source" to the effect that marijuana was growing inside this location, where that source had seen marijuana plants growing in the first floor, inside the residence.⁶ Yet this information comes from a source whose reliability is not established; furthermore, there is no time frame as to when the source allegedly made such observations or when they relayed this information to Detective Kelly.⁷ The

⁶ There was nothing found on the first floor that would have suggested that marijuana was ever growing on the first floor during the execution of the warrant (N.T. 1/26/05 page 36) including an air conditioner which the Affiant suggests in the conclusion of the Affidavit that Petitioner may be utilizing to offset the heat from the high-powered lamps used to grow marijuana (Warren Street Affidavit, page 9). Not only was this information not corroborated by the police, it was not confirmed after executing the search warrant.

⁷ On page 14 of Judge Lally-Green's Opinion (App. 1), she states "The Affiant provided that on August 31, 2004, a confidential source (Continued on following page)

source did not give a detailed description of the marijuana growing inside Warren Street or demonstrate an inside basis of knowledge. Detective Altieri attempted to corroborate that information but there is no police corroboration of any actual criminal activity at that location. Detective Altieri states that the property was all locked up and the windows were covered but does not say in any unusual manner.

The Affiant then provides information on page 4 of the Affidavit that Detective Altieri learned that Patrick Otterson, the Petitioner, is the lessee for "Wood Street, Norristown, PA"⁸ and that Petitioner "has been arrested in the past . . . for possession of a small amount of marijuana." However, the issuing authority, who is supposed to be neutral in their review, was not informed by the Affiant that Otterson's arrest had occurred on September 14, 1996, more than eight years prior to the issuance of the warrant, and that the charges against Petitioner had been dismissed. (N.T. 11/3/05 pages 14-15).

At this point in the Affidavit, the Affiant has the name of Petitioner, however, none of the informants

advised Detective James Kelly of the Upper Moreland Police Department that the Warren Street property was abandoned and that marijuana plants were growing inside." However, the Affidavit does not contain a date when the confidential source provided information to Detective Kelly.

⁸ West Wood Street is a couple blocks south of West Warren Street in Norristown, PA.

in the Affidavit corroborate this information. Furthermore, a neighbor provided information that the occupant of Warren Street is a white male and that he operates a silver pick-up truck. The police never corroborated that the occupant is a white male or that he owns or operates a silver pick-up truck anywhere in the Affidavit.⁹

The Affiant further claims that on September 14, 2004, information was received from an "anonymous female" that marijuana was being grown at that location (Warren Street Affidavit, page 5). A police officer went to the premises and once again observed that the residence was locked up and the windows were completely covered. Again, it is not suggested that the windows are covered in any unusual manner. No corroboration was obtained, however, with respect to the information provided by the "anonymous female" concerning marijuana. The issuing authority was provided with no information to suggest that the anonymous female was reliable nor was he provided with any information as to how or when this source had acquired her information.

Next, the Affidavit refers to a "second anonymous tip" on September 16, 2004, but there is no information presented therein which would suggest that this

⁹ The Affiant testified that he made no attempt to link Petitioner to the silver pick-up truck or any address using the DMV or by accessing governmental records when preparing the Affidavit for Warren Street (N.T. 11/3/05 pages 22-23).

is a different "anonymous female" from the one on September 14, 2004; a female once again claims that marijuana is growing inside the residence. The source of that information is alleged to be a neighbor who has seen marijuana growing on the first floor. Therefore, as to the information in the Affidavit concerning marijuana, these paragraphs set forth no information that would establish either reliability or basis of knowledge that would support the tip. There is no time frame given as to when the neighbor made their observation or when it was relayed to the "anonymous female." No police corroboration of the criminal activity suggested in the tip is provided by the Affiant.¹⁰

On page 6 of the Warren Street Affidavit the Affiant states "the reason why everyone is concerned is because of an incident that occurred in Philadelphia concerning firemen that had died in a fire where marijuana had been growing." The Affiant, Officer Parsley, testified, "that it was Detective Altieri's idea to craft the two paragraphs about this incident in the Affidavit and that the Affiant did not have a role in making this decision" (N.T. 11/3/05 page 17). This irrelevant information is a tactic to sway a neutral magistrate to issue the search warrant.

¹⁰ The tipster claimed that the air conditioners and lights operate on a timer, yet the police investigation disclosed that the lights and air conditioners were on all the time (Warren Street Affidavit pages 4, 7).

The Affiant then claimed that he had continually checked the "aforementioned location" and yet failed to observe Petitioner or his vehicle during the past month.¹¹

The police did obtain a sealed search warrant issued by the Honorable William Nicholas, the Suppression Judge, for the use of a thermal imaging device on October 12, 2004, which is discussed in the Warren Street Affidavit on pages 7-8.¹² The supposed result of the search was that the police were unable to obtain an accurate reading because of the cold weather, although no temperature was recorded. However, the thermal imaging scan did indicate heat coming from two air conditioners on the second floor, which could have been dual purpose heating/air conditioning window units (N.T. 11/3/05 pages 25-29). Nevertheless, the Affidavit does not present any attempt by the police to use the thermal imaging detector on another occasion when the weather would not have been a factor. Accordingly, the Affiant could

¹¹ During the execution of the warrant at Warren Street there was no automatic watering system found that would allow Petitioner to be away from the property for more than a couple days at a time. Petitioner contends that he was at the property almost every day even though he no longer spent the night.

¹² Petitioner has never seen a copy of this sealed search warrant as it was not contained in his discovery packet. Petitioner's counsel did not challenge this search warrant because his counsel's strategy was to use the results of the thermal search to further prove that the Affidavit lacked probable cause (N.T. 11/3/05 pages 3-4, 68-73).

offer no criminal activity detected by the use of this scientific device.

The Affidavit next reports that on October 27, 2004 Detective Jeffrey Koch contacted Detective Altieri and stated that an "unknown female" left a message on the Drug Tip Line that marijuana was growing inside Warren Street and that the neighbors have smelled strange odors emanating from the property. Once again no information is presented therein which would suggest that this source is a different "anonymous female" from those of September 14 and 16 (N.T. 11/3/05 page 29). There is no information that would establish the reliability or the basis of knowledge of the female that would support the tip nor is there any information as to how or when the "unknown female" had acquired her information from the neighbors or how and when the neighbors made their observations. In fact, Detective Koch does not advise Detective Altieri when he received the tip or when the female left the tip. Furthermore, no police corroboration is obtained. (Warren Street Affidavit, page 8).

The Affiant along with Detective Altieri claimed to have spoken with an anonymous person on October 27, 2004, who allegedly reported to have smelled what they described as "Skunk" Weed odor coming from the residence, a term that supposedly means "Home Grown" marijuana due to the strong odor it

produces.¹³ The police also claimed to have spoken to an unknown person who alleged to have personally seen marijuana growing from within this location. The issuing authority is not informed "when" these events occurred or "how" they came about. The Affiant offers no information on how the sources would have been competent to determine these observations were consistent with that of marijuana. Furthermore, the police obtained no corroboration of this information and the Affidavit sets forth no basis of knowledge or anything concerning the veracity or reliability of either "subject" (Warren Street Affidavit pages 8-9).¹⁴

¹³ Importantly, no effort was made by the police to inspect the premises themselves in order to determine whether or not such an odor existed at that location. The Supreme Court of Pennsylvania has held that the police can use a trained dog to ascertain whether there is a scent of marijuana in the premises. *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987). Petitioner contends that it was of great moment that this was not done before the Affidavit was submitted to the issuing authority.

¹⁴ Petitioner notes that the Superior Court of Pennsylvania appears to no longer be relying, as it did, in its Memorandum Decision of August 21, 2007, upon *Commonwealth v. Karns*, 566 A.2d 615 (Pa. Super. 1989). In the first panel decision, the Superior Court contended that under *Karns*, probable cause could be found from "independent sources" who supplied "identical information." However, in *Karns*, the Affidavit contained information from an informant who had supplied police with such information on ten previous occasions, resulting in seizures of drugs, while a second informant had often purchased marijuana from the defendant over the previous two years, and both informants were able to independently describe a hydroponic system of marijuana growth at that location, thus establishing their "inside" basis of knowledge. As discussed above, the

(Continued on following page)

In the Affiant's "Conclusion" on page 9 of the Affidavit, Officer Parsley states, "As an experienced Narcotics Detective, Detective Altieri is aware that if a person was to cultivate marijuana in a residence, they would need Hydroponic lights, which would draw excessive electricity for them to operate. These high-powered lamps would create an excessive heat source to radiate inside the residence." However, there is no information whatsoever in the Affidavit to support these statements.¹⁵

Petitioner respectfully submits that the ruling of the Superior Court of Pennsylvania in Petitioner's case cannot stand under *Gates* and *Torres*. As was the case in *Torres*, here too, the police have relied upon unnamed unidentified, and anonymous or confidential sources who satisfy neither the basis of knowledge nor reliability requirements under *Gates* and *Torres, supra*. A reviewing Court cannot say with confidence that these sources had a good reason to know of what they spoke or that their information was accurate. In the case at bar, none of the so-called "sources" gave a detailed description of the alleged growing marijuana they claimed to have seen. *Contra*,

information provided by the informants in the instant case had no prior reliability and their tips clearly lacked police corroboration.

¹⁵ Petitioner is amazed that Detective Altieri is not the Affiant as he seems to have acquired most of the information within the four corners of the Affidavit (N.T. 11/3/05 pages 9-21).

Karns at 615. Nor did they establish a time frame of the alleged observations. See *Edmunds, supra*, at 891. There were no accounts of marijuana use or sales and there were no predictive accounts of Petitioner's conduct or activities as there were in *Gates*. There is no "inside" basis of knowledge demonstrated by any of the sources. Furthermore there is no police corroboration.

Just as in *Florida v. J.L., supra*, where the Supreme Court of the United States found that there was no reasonable basis for suspecting *J.L.* of engaging in unlawful conduct even though the police found a gun, here the anonymous tips did not provide sufficient probable cause to issue a search warrant even though the police found marijuana. The police investigation in this case had failed to establish that Petitioner was engaged in marijuana growing activity at Warren Street. Judge Lally-Green states that the police investigation produced information that "was consistent with a marijuana growing operation," yet it was equally consistent with lawful and noncriminal conduct.¹⁶ As to the sources who claimed to have "smelled" or "seen" marijuana, there is no corroboration of that information even though the police have

¹⁶ Petitioner submits that the activity of a homeowner in locking up his residence and completely covering their windows by drawing the blinds and closing the curtains is surely not inconsistent with innocent behavior. It is actually more consistent with the notion that the homeowner is asserting that he has a right of privacy that the Constitution must recognize.

continuously checked the property in the month prior to filing the application for the warrant for Warren Street.¹⁷ Even the thermal imaging scan on October 12, 2004 failed to provide objective information that would have established that the information was valid.

The Superior Court of Pennsylvania decided this case in a manner which conflicts with decisions of the Supreme Court of Pennsylvania and the Supreme Court of the United States. As in *Torres* and *Edmunds, U.S. v. Fields*, and *U.S. v. Wells, supra*, this Honorable Court cannot allow a search warrant to stand that is based upon information that comes from unestablished and unqualified anonymous sources where attempts by the police to corroborate that information were not successful except as to innocent details and facts that were essentially public in nature. Thus, there was no substantial basis for a finding of probable cause.

Petitioner respectfully submits that in view of the fact that the warrant executed at Warren Street was unlawful, the warrant executed at Sterigere Street was unlawful as the fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963).

¹⁷ One can only imagine how quickly the police would have inserted into the Affidavit of Probable Cause the fact that during one of their many checks of this location, they had the occasion to smell "skunk" weed or had obtained other information that would have corroborated the claim that marijuana was growing inside the house.

The Affidavit for the Warren Street property does not mention the Sterigere Street property despite the access to information available to the police. Review of the record will indicate that the suspicion of marijuana growing at the Sterigere Street property arose only after the police obtained Petitioner's permission to search his primary residence at [Home Address Omitted], Norristown, PA, after his arrest at the Warren Street property. The police had no information whatsoever on the Village Green Lane or the Sterigere Street addresses.¹⁸

It is clear that this second warrant was obtained through exploitation of the previous unlawful police conduct. Probable cause did not exist to issue the second warrant absent the information obtained from the search and arrest at Warren Street. See *Commonwealth v. Knowles*, 327 A.2d 19 (Pa. 1974); *Wong Sun, supra*.

The Affidavit for the Sterigere Street search warrant, which Detective Altieri is now the Affiant, directly references the search at Warren Street where police discovered marijuana growing at that location,

¹⁸ Petitioner contends that the search of his residence along with his statement was coerced in order to release his girlfriend without being charged. Detective Altieri testified that he would not charge Petitioner's girlfriend if he acknowledged that the marijuana was his (N.T. 11/3/05 pages 108-110). Detective Altieri, Officer Parsley, and Lieutenant Bernstiel drove Petitioner's girlfriend to Petitioner's residence to conduct the search (Sterigere Street Affidavit, page 5).

including the facts that the blinds were drawn, windows were sealed, air conditioners were employed and PVC piping was present. (Sterigere Street Affidavit, page 3).

On page 5, the Affidavit references Petitioner's statement to the police, but does not indicate that this statement makes no reference whatsoever to any location other than Warren Street. The Affidavit also references the consensual search that the police conducted at Village Green Lane, yet no evidence was seized at that residence which identified another location wherein a marijuana growing operation would be found. However, the Affiant relied upon the review of three calendars seized from that location that had different harvest dates to support his conclusion that the Petitioner would have more than one growing location. Furthermore, Petitioner's driver's license seized at that location, (Sterigere Street Warrant, at page 5) which was Petitioner's old "expired" license, listed Sterigere Street as Petitioner's address.

Because of the evidence derived from the search at Warren Street, the Affiant, Detective Altieri, along with Officer Parsley, went to Sterigere Street on October 29, 2004. At that location, the police made observations that the location on Sterigere Street was consistent with the way they had seen the location at Warren Street. On page 6 of the Sterigere Street Affidavit, the police report that all the windows were all covered up so no one could look inside and newer

air conditioners were in the upper windows.¹⁹ The police further report that the electric meter was spinning as if there was an excessive electric draw, yet offer no expert analysis of this issue. The Affiant then reports smelling the distinct odor of marijuana while standing at a lawful vantage point at the front door of the residence.²⁰ In *U.S. v. Depew*, 8 F.3d 1424 (C.A. 9, 1993), the Ninth Circuit held that 6 feet from garage door and 50-60 feet from defendant's house from which police officer smelled marijuana growing

¹⁹ It is not reported in the Affidavit for Sterigere Street that the air conditioners were running as was the case in the Warren Street Affidavit every time during the many police checks of the property.

²⁰ On page 7 of the Sterigere Street Affidavit the Affiant states "At the time of Otterson's arrest, we took his keys and one of the keys 'opened' the door of Sterigere Street, but we did not make entry." The Affiant would have had to first open the storm door to access the front door. The Affiant uses the word "opened" not "unlocked." This is most likely the unlawful vantage point that the Affiant smelled the distinct odor of marijuana. The marijuana at this location was found on the second and third floor loft or attic (N.T. 1/26/05 page 5). The marijuana at the Warren Street property was found on the second floor (N.T. 1/26/05, page 5) and yet the police were not able to corroborate the smell of "skunk" weed odor when checking the locked doors at that location or during many periodical checks.

Petitioner finds it remarkable that on the face of the Sterigere Street Warrant the Affiant describes the premises to be searched as a 3-story white stucco home, yet from outside of the home it appears to be a 2-story home with small attic windows on either side, approximately one foot by one foot. There are no full size windows or dormers that would suggest that there was a third floor.

inside house, was within "curtilage" of house for Fourth Amendment purposes.

Again, from an alleged lawful vantage point the Affiant claimed to have noticed a trash bag on the kitchen floor that matched the trash bags located in Warren Street that contained marijuana. Also, Officer Parsley noticed a magnet on the refrigerator with P.H. Otterson, which was a magnetic business card, even though the Affiant states near the beginning of the same paragraph, "all the windows were all covered up so no one could look inside." The police also observed several empty Heineken bottles and cases in the kitchen area (Sterigere Street Affidavit pages 6-7).

The Affiant concluded that the location on Sterigere Street had the "same characteristics to Warren Street" in that both properties appeared abandoned, had air conditioners in the windows, had windows sealed up so as to avoid detection and had similar PVC pipe outside (Sterigere Street Affidavit pages 7-8).

A conclusion that the search at Warren Street was unlawful will surely support a further conclusion by this Honorable Court that the search at Sterigere Street was tainted by that primary illegality and therefore, suppression of the second warrant is also required. The police did not have evidence independent of the information obtained from Warren Street to support this second warrant.

During the entire police investigation, no evidence was developed that there was a location at Sterigere Street in which another marijuana growing operation would be present. Nothing spoken by Petitioner during his interview with police and nothing obtained by the search of his primary residence resulted in facts which would have supported such a conclusion. The three calendars seized at Petitioner's residence that appeared to denote different harvest dates did not create a probability that marijuana was being grown at another location, and certainly provided the police with no indication that such an operation could be found at Sterigere Street. There was no basis to support a conclusion that multiple harvest dates require different locations for growing marijuana and no expert declaration to establish that fact was offered.

Furthermore, when the police approached the Sterigere Street house on October 29, 2004 at 7:00 pm, they had to trespass the curtilage of this residence. At the suppression hearing, Detective Altieri testified, "that the house is set back from the street, sitting at the end of a long driveway and that he pulled his truck in the driveway, went onto the property and proceeded to look into the windows" (N.T. 11/3/05 pages 40-43).²¹ At that time the police officers put

²¹ On the face of the Sterigere Street Warrant, in the description of the premises to be searched, the Affiant states "This warrant also includes the curtilage surrounding the home which includes a green storage barn." This contradicts Detective

(Continued on following page)

themselves in a position where they could allegedly smell the odor of marijuana, yet they did not have a search warrant and there were no exigent circumstances that would have excused one.

Under the Fourth Amendment, there is an overriding respect for the sanctity of the home and this protection has been extended to the curtilage, which is defined as an area where an individual reasonably may expect that he has a right to privacy. The curtilage area is the area that surrounds and is immediately adjacent to the residence and is afforded a greater privacy protection than that of an open field.

In the instant case, the area surrounding the Sterigere Street premises was part of the "adjacent" area with respect to the home and therefore, the police clearly trespassed by leaving the public sidewalk and proceeding down the long driveway, approximately 40 yards, towards the home and then standing on Petitioner's patio (N.T. 11/3/05 page 43), which was attached to the home, as they made visual and soon after olfactory inspections of the home. All without a search warrant. See *Depew, supra*.

Petitioner took clear steps to shield his premises on Sterigere Street from public inspection. Petitioner

Altieri's testimony, "that the property was an open field and a yard," then states "I think there was a fence around the back of the property." (N.T. 11/3/05 page 41). Petitioner asserts that the one acre property is mostly surrounded by a fence including the front and that the mailbox is on the street.

took measures to safeguard his privacy in an area generally thought to be private, in a home that was deeply recessed from the public street and beyond the point at which a reasonable person would expect that there would be public traffic. Therefore, Petitioner exhibited an actual expectation of privacy with respect to the content of the Sterigere Street property, including but not limited to, the covering of windows and doors with the complete closing of blinds and curtains that shielded the inside of the house from public inspection.

Accordingly, Petitioner respectfully submits that under all of these circumstances, the issuing authority did not have a substantial basis to authorize a search at Sterigere Street. The warrant that was issued was clearly influenced and tainted by the results of the police search and investigation conducted as a result of the unlawful search at Warren Street. The additional information that was set forth in the Affidavit for Sterigere Street was obtained by an unlawful trespass by the police into a private area that was not open to public traffic. An area that the police would never have entered had there not been the unlawful search at Warren Street. Therefore, the Superior Court of Pennsylvania should have reversed the Order denying suppression as to these premises as well.

In the Affidavit for the primary search warrant at Warren Street the anonymous sources did not demonstrate an inside basis of knowledge and there is no information that qualifies their reliability or

veracity. The sources provide no predictive accounts of conduct or activity, criminal or otherwise and they do not provide when or how they came to make their observations. The sources did not know the occupant's name or any other address associated with him.

The police investigation revealed that the occupant was not at the property during their many periodic checks, the air conditioners and lights were on continuously, the windows were covered by the complete closing of blinds and curtains and the doors were locked. Notwithstanding the locked doors, this information could be observed from the "public" sidewalk or street. These general observations were publicly available and noncriminal in nature.

The police investigation failed to corroborate that the occupant was a white male or that he owned or operated a silver pick-up truck, which was information presented to the police. Police did not associate the occupant with any other address except the one on Warren Street. The police did not corroborate that somebody comes to pick up the mail, which is delivered every day, excluding Sunday, or that the occupant removes trash bags at night. Police do not see anyone coming or going to the property, yet there was supposedly a marijuana growing operation going on at the property. The police do not corroborate the two tips that the air conditioning units and lights are operating on a timer, only that they are continuously on. It is not corroborated by the police that the odor of marijuana existed or that marijuana could be seen growing on the first floor. In fact, it was not confirmed

that marijuana was growing or that it was ever growing on the first floor after the warrant was executed. The police failed to establish through a thermal search the existence of high powered hydroponic lamps or that there was an excessive amount of electricity being drawn at the property. Yet, this is how the Affiant concludes his Affidavit of probable cause.

If our United States Supreme Court allows the primary search warrant at Warren Street to stand along with the fruits of such which was obtained in violation of Petitioner's federal and state constitutional rights, it will lead the way for government intrusion of its citizens as well as corruption in our police to run amuck conducting unreasonable searches and seizures with unjust or no probable cause, breaking the very framework installed in our Constitution to prevent the loss of liberty of our citizens.

The Supreme Court cannot allow our police to conduct searches and seizures on the grounds of accusations without any police or other corroboration where the reliability, basis of knowledge and veracity of anonymous sources are not established.

CONCLUSION

For all the reasons expressed herein, Petitioner, Patrick H. Otterson, respectfully prays that the Supreme Court of the United States grant this Petition for Writ of Certiorari and allow further review of the ruling of the Superior Court of Pennsylvania and award appropriate relief in the interest of justice and fundamental constitutional concerns.

Respectfully submitted,

PATRICK H. OTTERSON, Pro-se

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2008 PA Super 85

COMMONWEALTH OF : IN THE SUPERIOR
PENNSYLVANIA, : COURT OF
Appellee : PENNSYLVANIA
v. :
PATRICK H. OTTERSON, :
Appellant : No. 1968 EDA 2006

Appeal from the Judgment of Sentence July 20, 2006,
In the Court of Common Pleas of
Montgomery County,
Criminal Division at No. CP-46-CR-0009849-2004.

BEFORE: LALLY-GREEN, GANTMAN and POP-
OVICH, JJ.

OPINION BY

LALLY-GREEN, J.:

FILED APRIL 29, 2008

¶1 Appellant Patrick H. Otterson appeals from the judgment of sentence entered on July 20, 2006, in the Court of Common Pleas of Montgomery County, following his conviction for possession with intent to deliver ("PWID") marijuana,¹ violation of the Uniform Firearms Act,² and related offenses. This case is before us once again on remand from our Supreme Court. We affirm.

¹ 35 P.S. § 780-113(a)(30).

² 18 Pa.C.S.A. § 6105 (persons not to possess, use, manufacture, control, sell or transfer firearms).

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¶ 2 The relevant facts and procedural history of this case were fully set forth in the trial court opinion as follows:

On March 30, 2006, [Appellant] was convicted of three separate Bills of Information for violation of the Controlled Substance, Drug, Device, and Cosmetic Acts (the "Drug Act") and for possession of a firearm. The main Bill charged three counts of violation of the Drug Act for possession and manufacture of marijuana plants between October 27, 2004[,] and October 29, 2004[,] at 420 West Warren Street, Norristown, Montgomery County, Pennsylvania (hereinafter, the "Warren Street property"). Bill of Information 9849.1 charged the same counts for possession and manufacture of marijuana plants between October 29, 2004[,] and October 30, 2004[,] at 1202-1208 Sterigere Street, Norristown, Montgomery County, Pennsylvania (hereinafter, the "Sterigere Street property"). Bill of Information 9849.2 charged [Appellant] with the same three counts for continuous manufacture and possession of marijuana plants between March 5, 2003[,] and October 30, 2004[,] at both the Sterigere Street property and the Warren Street property. These convictions were the result of events that took place between October 27 and October 30, 2004.

On October 27, 2004, Officer Eugene Parsley of the Norristown Police Department executed a search warrant on the Warren Street property. As a result of the search, the

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police seized 64 marijuana plants, hydroponic lamps, two light timers, a timer for an air conditioner, duct work, and filter and fluorescent lights, among other items. The Affidavit of Probable Cause executed by Officer Parsley may be summarized as follows:

On August 31, 2004, Detective Michael Altieri of the Montgomery County Narcotics Enforcement Team received information from Upper Moreland Police Detective James Kelly that a confidential source provided him with information that the Warren Street property was abandoned, and that there was marijuana growing inside the residence at that location. The confidential source stated that he/she has seen marijuana plants growing in pots on the first floor inside that residence;

On August 31, 2004, Detective Altieri went to the Warren Street property to corroborate the information from Detective Kelly. It appeared that the property was locked up; the windows were all covered; and an air conditioner was running on the second floor, front;

A resident of the 400-block of West Warren Street told Detective Altieri that a white male lives at the Warren Street property on a part-time basis; that he drives a silver pick-up

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truck; only arrives once a week, stays for a couple of hours and then leaves;

Periodic checks of the property by the police revealed that the lights on the first floor stayed on all night. A check of the entire neighborhood by the police failed to locate the pick-up truck;

The detective learned that [Appellant] is the lessee of 420 West [Warren] Street, Norristown, Pennsylvania, and that [Appellant] had been arrested in the past for possession of a small amount of marijuana;

On September 14, 2004, an anonymous female called the Norristown Police to report that marijuana was being grown inside the Warren Street property; that no one lives there, and that it was just a "front." In response to the call, Officer Christopher Narkin went to the location and observed that the residence was locked up, and the windows were covered so no one could see inside. He reported his findings to Detective Altieri because he felt that there was something suspicious about how the residence was covered up;

On September 16, 2004, a second anonymous female called Detective

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Altieri and stated that marijuana was growing inside the Warren Street property. She said that a white male arrives about once a week and removes large trash bags from the residence under the cover of darkness and loads them onto his pick-up truck, that the air conditioners and lights operate on a timer, and that the man does not live there. She also said that one of the neighbors has seen marijuana growing on the first floor and that she and the neighbors feared for their safety and preferred to remain anonymous for this reason;

Periodic checks of the property by the investigating police officers during the month prior to the issuance of the search warrant on October 27, 2004[,] failed to reveal any sign of [Appellant] or the pick-up truck. Yet, the lights were seen to be always lit on the first floor, the windows and doors were covered up and the air conditioner was running on the second floor, even in extremely cool weather.

On October 8, 2004, [the trial court] issued a sealed search warrant for the use of a thermal imaging device at the Warren Street property.

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On October 12, 2004, the thermal imaging scan was conducted, but due to the cold weather conditions (surrounding properties had their heat on), an accurate reading could not be obtained. Two air conditioners on the second floor were running, despite the cold weather;

On October 27, 2004, Detective Jeffrey Koch reported to Detective Altieri that an unknown female had telephoned the Drug Tip Hotline and left a message that marijuana was growing inside the Warren Street property; that no one lives there; that a suspicious male goes to the residence periodically; and that the neighbors have smelled strange odors emanating from the property;

On October 27, 2004, Officer Parsley and Detective Altieri spoke to a confidential informant who told them that he/she smelled the strong odor of "skunk weed" or "homegrown" marijuana coming from the Warren Street property;

On October 27, 2004, Officer Parsley and Detective Altieri also spoke to another confidential informant who reported that he/she personally had seen marijuana growing inside the Warren Street property. This person also said that, after the police began

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to investigate the property in late August, the occupant appeared to clear up the overgrown weeds and also covered the windows more thoroughly so no one could see inside. The confidential informant also said the air conditioners still go on every night, even with the cold weather;

Both confidential informants said that the occupant only comes to the residence periodically and that he "hasn't been seen there since last week."

While the officers were executing the search warrant at the Warren Street property, [Appellant] arrived. Upon seeing the officers, [Appellant] fled, but was apprehended with his girlfriend a short time later. That same night, [Appellant] was arrested and read his **Miranda** warnings. He gave a statement admitting that he had harvested approximately 50 marijuana plants four months earlier. [Appellant] th[e]n signed a consent to search form for another one of his residences located at 2804 Village Green Lane, Norristown, Montgomery County, Pennsylvania. As a result of this search, the police seized calendars denoting different harvest dates. Many of these harvest dates overlapped[,] suggesting that [Appellant] had more than one location where he [grew] marijuana. The calendars included harvest dates between March 5, 2003[,] and October

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30, 2004. The calendars and [Appellant's] statement formed the basis for [Appellant's] conviction on Bill of Information 9849.2.

On October 29, 2004, Detective Altieri executed a search warrant on the Sterigere Street property, the address shown on [Appellant's] driver's license. As a result of the search, the police seized a total of 121 potted marijuana plants, calendars, hydroponic lamps, and a double barrel shotgun, among other items.

...

Subsequently, [Appellant] filed a motion to suppress the evidence seized pursuant to the search warrants. A hearing on this motion was held on November 3, 2005[,] in front of the Honorable William T. Nicholas. On December 5, 2005, Judge Nicholas entered an Order denying [Appellant's] motion and placed his findings of fact and conclusions of law on the record. [Appellant's] trial was held on March 29, 2006[,] and March 30, 2006. The [trial court] found [Appellant] guilty of the three Bills of Information charging [Appellant] [with] violations of the Drug Act. On July 25, 2006, [Appellant] was sentenced to not less than 5 years on the main Bill, not less than 5 years on Bill of Information 9849.1 and 3 to 5 years on Bill of Information 9849.2. These sentences were to run concurrent with one another. [The trial court] also sentenced [Appellant] to 1 to 5 years for possession of a firearm to run consecutive with the other

sentences. [Appellant] appealed his judgment of sentence on July 25, 2006. In accordance with [Rule] 1925(b) of the Pennsylvania Rules of Appellate Procedure, [the trial court] directed [Appellant] to file a Concise Statement of Matters Complained of on Appeal no later than August 8, 2006. Appellant filed such statement on August 4, 2006.

Trial Court Opinion, 9/5/2006, at 1-5 (footnotes omitted).

¶ 3 This case was previously before this Superior Court panel in 2007. In an unpublished memorandum filed on August 21, 2007, we affirmed Appellant's judgment of sentence. *See Commonwealth v. Otterson*, 938 A.2d 1119 (Pa. Super. 2007) (unpublished memorandum). Appellant filed a timely petition for allowance of appeal to the Pennsylvania Supreme Court. In a *per curiam* order filed December 28, 2007, the Supreme Court granted Appellant's petition, vacated this Court's memorandum affirming the judgment of sentence, and remanded the case to this Court for reconsideration in light of *Commonwealth v. Torres*, 764 A.2d 532 (Pa. 2001). *See Commonwealth v. Otterson*, 2007 Pa. Lexis 2908 (Pa. Dec. 28, 2007).

¶ 4 On appeal, Appellant presents the following issues for our review:

1. Did the [trial court] err in denying the Appellant's Motion to Suppress Evidence seized as the result of an execution of a search warrant which lacked probable

cause for 420 W. Warren Street, Norristown, PA?

2. Did the [trial court] err in denying the Appellant's Motion to Suppress evidence seized at 1202 Sterigere Street, Norristown, PA which was tainted by the illegal search and seizure conducted at 420 W. Warren Street and which was not supported by independent and lawfully acquired probable cause?
3. Was the evidence insufficient as a matter of law to establish the Appellant's guilt beyond a reasonable doubt on Bill No. 9849.2 where the [Commonwealth] did not establish that a *corpus delicti* existed as to this offense?

Appellant's Brief at 4.³

¶ 5 In his first and second issues, Appellant challenges the denial of his motion to suppress. Appellant first argues that the affidavit filed in support of the search warrant for the Warren Street property did not provide probable cause to search. Appellant claims the affidavit was fatally flawed because it was based on information obtained from confidential

³ In his supplemental brief filed post-remand, Appellant did not raise the third issue challenging the Commonwealth's failure to establish the *corpus delicti* of the drug offense. Nevertheless, because our initial memorandum disposing of this claim was vacated, we will again address this issue in the instant memorandum.

informants who did not have a history of reliability, there was no showing of how the informants acquired their information, and the criminal information was not corroborated by independent police investigation. As a result, Appellant claims that the court erred in denying his motion to suppress the evidence obtained from the Warren Street property. *See* Supplemental Brief for Appellant at 8. In his second issue, Appellant asserts that because the Warren Street property search was improper, the warrant obtained for the Sterigere Street property was unlawful as “fruit of a poisonous tree.” *Id.* at 17.

¶ 6 We review orders denying a motion to suppress in accordance with the following, well established, standards:

Our standard of review of a denial of suppression is whether the record supports the trial court’s factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Brown, 924 A.2d 1283, 1286 (Pa. Super. 2007), quoting **Commonwealth v. Reppert**, 814 A.2d 1196, 1200 (Pa. Super. 2002).

¶ 7 Our Supreme Court has adopted the “totality of the circumstances” test for determining whether a search warrant was supported by probable cause. *See Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1985). This test was first set forth by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983). Pursuant to the totality of the circumstances test:

[T]he task of the issuing authority is to make a practical, common sense assessment whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Further, [a] magistrate's finding of probable cause must be based on facts described within the four corners of the affidavit[.]

Commonwealth v. Jones, 928 A.2d 1054, 1059 (Pa. Super. 2007) (internal quotes and citations omitted).

“[P]robable cause does not demand the certainty we associate with formal trials.” [*Gates*, 462 U.S. at 246.] Rather, a determination of probable cause requires only that the totality of the circumstances demonstrates “a fair probability that contraband or evidence of a crime will be found in a particular place.” [*Torres*, 764 A.2d at 537, quoting *Gates*, 462 U.S. at 238-239]. Thus, where

the evidence available to police consists of an anonymous tip, probable cause may be established upon corroboration of major portions of the information provided by the tip. *See Gates*, 462 U.S. at 246. Similarly, where the evidence consists of the allegations of a police informant who has not previously provided information, probable cause requires only corroboration of principal elements of information not publicly available. *See Torres*, 764 A.2d at 539-540. As recognized by the Court in *Gates*, “[i]t is enough, for purposes of assessing probable cause, that ‘[c]orroboration through other sources of information reduced the chances of a reckless or prevaricating tale,’ thus providing ‘a substantial basis for crediting the hearsay.’” *[Gates*, 462 U.S. at 244-245, quoting *Jones v. United States*, 362 U.S. 257, 269, 271 (1960).]

Brown, 924 A.2d at 1286-1287.

¶ 8 Our Supreme Court remanded the instant case to this panel for our consideration in light of *Torres*.⁴

⁴ *Torres* involved consolidated appeals from two co-defendants. The Supreme Court explained that judicial economy was best served by disposing of the two appeals together because the police used the same affidavit of probable cause to support their applications for search warrants to both defendants' apartments located at 5631 Rippey Street in Pittsburgh, Pennsylvania. *See Torres*, 764 A.2d at 535. For our purposes in the instant matter, we note that our discussion of the *Torres* case reflects only the facts and holding of the Supreme Court with respect to the defendant identified as “Torres” in that case.

Therefore, we will review that case in detail. Torres was arrested and charged with three counts of homicide after the police found two guns and other incriminating items during a search of his apartment conducted pursuant to a warrant. Torres filed a pre-trial motion to suppress the evidence found in his apartment, asserting that the warrant was not supported by probable cause. Following a hearing, the suppression court found that the affidavit of probable cause filed with the warrant application was "frustratingly sparse" in that it merely set forth in narrative form the information that the affiants had learned without clearly explaining where they obtained each piece of information. *See Torres*, 764 A.2d at 538. Further, the court found that there was no way for the issuing authority to tell from the affidavit how the anonymous sources cited therein had obtained their information.⁵ Finally, the suppression court found that the only corroboration that imparted any reliability to the information obtained

⁵ The affidavit at issue in *Torres* identified the witnesses as follows:

Numerous interviews have been conducted in this case. The identity of these witnesses is known to your affiants. These witnesses will be available to testify at any necessary court proceedings.

Torres, 764 A.2d at 535. The Supreme Court explained that the tipsters were properly considered "anonymous sources" by the lower courts because "since none of them [was] named, there was no indication that any of them had previously provided information to the police and no reason was given for the failure to divulge their names." *Id.* at 537 n.3.

from the anonymous sources was the officers' observations of a vehicle outside Torres' apartment complex that matched the general description of the getaway car at the murder scene. In light of the lack of information regarding the basis of the unnamed sources' knowledge or their veracity, as well as the failure of the affidavit to credit each piece of information to one of the sources, the suppression court concluded that the corroborated information was insufficient to sustain the search warrant. *Id.* As such, the court granted the defendant's motion to suppress.

¶ 9 The Commonwealth appealed to this Court. We held that although the affidavit failed to expressly establish either the veracity of anonymous sources or the basis for their knowledge, the information that they provided to the police was sufficiently bolstered by certain indicia of reliability. *See Commonwealth v. Torres*, 714 A.2d 416, 420 (Pa. Super. 1998). As such, we concluded that the affidavit provided the issuing authority with a substantial basis to support his finding of probable cause to search, and reversed the order granting the defendant's motion to suppress.

¶ 10 On appeal, our Supreme Court reversed. The Supreme Court held that this Court "gave too much weight to the indicia of reliability attending the information included in the affidavit" and therefore erred in reversing the suppression order. *Torres*, 764 A.2d at 539. The Court rejected the Commonwealth's claim that a commonsense reading of the affidavit

indicated that at least one of the anonymous sources had personal knowledge of the events in question. The Supreme Court explained that:

[T]he mere fact that one or more of the anonymous sources provided a somewhat detailed account of the activities of the victims and their assailants preceding the murders does not, in and of itself, constitute a significant indicia of the reliability of that information. In addition, the fact that the police verified the address, phone number and general age given to them for Torres – whose address and phone number were listed in the phone book and were therefore freely available to the public – does not constitute a significant indicia of the reliability of the other information provided to the police by the anonymous sources.

Id.

¶ 11 The Supreme Court also distinguished *Torres* from the United States Supreme Court's holding in *Gates*, noting that the information provided by the anonymous sources in *Gates* contained not only a detailed account of the defendant's activities in furtherance of the crime, but also a correct prediction of future criminal acts. *Id.* at 539 n.7. No such predictive information was provided by the anonymous sources in *Torres*. Finally, the Court explained that the affiant's observation of the vehicle parked outside Torres' apartment complex (which matched the description of the car seen fleeing from the murder scene) was not sufficient corroboration of the anonymous source's

information. The Court explained that there was no clear indication in the affidavit as to how the police obtained their description of the fleeing vehicle. Even though the affidavit explained that the vehicle had a New York license plate, which was consistent with information that Torres indicated he was from New York, the affidavit did not provide that the police linked the plate to Torres or his co-defendant. *Id.* at 539-540.

¶ 12 The Supreme Court concluded in *Torres*:

Although the basis of knowledge and veracity of anonymous sources are only factors to be considered by the issuing authority in making probable cause determinations, they retain a vital role in cases such as the instant one, where the affidavit of probable cause is almost entirely based on information gleaned from anonymous sources. **Where, as here, there is no attempt made to establish either the basis of knowledge of the anonymous sources or their general veracity, a strong showing of the reliability of the information that they have relayed to the police in the specific case is required in order to support a finding of probable cause.** Such a showing is simply not made by the affidavit of probable cause in the instant case.

Id. at 540 (emphasis added).

¶ 13 The case presently before us is distinguishable from *Torres*. The affidavit at issue here was presented

as part of the application for a search warrant on October 27, 2004. The affiant provided that on August 31, 2004, a confidential source advised Detective James Kelly of the Upper Moreland Police Department that the Warren Street property was abandoned and that marijuana plants were growing inside. That day, Detective Altieri went to the Warren Street property and found the property locked up, the windows covered, and the air conditioning unit on the second floor turned on. In addition, the back deck of the property was overgrown with weeds. The affidavit provided that Detective Altieri spoke to an unidentified neighbor who informed him that a white male typically arrived at the Warren Street property once per week, stayed a few hours, and then would leave. The neighbor stated that the man drove a silver pickup truck.

¶ 14 The affidavit further provided that Sergeant Robert Sobeck of the Norristown Police Department performed periodic checks of the Warren Street property. During these checks, he noticed that there was no change in the condition of the property and the lights on the first floor stayed on all night. In addition, the affidavit indicated that Detective Altieri's investigation revealed that Appellant was the lessee of the property and that he had previously been arrested for possession of marijuana.

¶ 15 The affidavit also cited two tips from anonymous females.⁶ The first anonymous tip provided that nobody lived at the Warren Street property and that it was being used as a "front" for a marijuana growing operation. The second anonymous source indicated that a white male visited the property once per week and was seen removing large trash bags under cover of darkness. The affidavit indicated that the second anonymous female stated that she and her neighbors wished to remain anonymous out of fear for their safety.

¶ 16 The affiant indicated that in the month prior to filing the application for a search warrant, he continuously checked the property and found no sign of Appellant or his vehicle. During the checks in the middle of the night, the affiant noticed that the lights remained on, the air conditioning remained on, and the windows and doors remained covered.

¶ 17 The affidavit provided that a warrant to use a thermal imaging device on the property was obtained on October 8, 2004. The thermal imaging scan was conducted on October 12, 2004. Due to cold weather conditions, an accurate reading could not be obtained. Nevertheless, the scan revealed two air conditioners running on the second floor of the property.

⁶ We note that it is unclear from the affidavit whether there were two separate anonymous female sources, or two separate tips from the same source.

¶ 18 The affidavit also provided that the affiant spoke with two confidential sources. One of these sources stated that he/she smelled "skunk weed," a term commonly used to describe home grown marijuana, coming from the Warren Street property. The other source informed the affiant that he/she personally saw marijuana growing inside the Warren Street property and that after the police began "snooping" around in late August, a person came and cleaned out overgrown weeds in the rear of the property and covered the windows more thoroughly. Both sources stated that the occupant came home only periodically and had not been there within the previous week. Again, the affidavit stated the confidential informants did not want their identity revealed because they feared retaliation.

¶ 19 Here, unlike in *Torres*, the affidavit in question provided information regarding the basis of the confidential sources' knowledge. For example, the affidavit specifically provided that one of the confidential sources told the affiant that he/she **smelled** "skunk weed," and another source said they **saw** marijuana growing inside the Warren Street property. In addition, the veracity of the sources' information was corroborated by independent police investigation. After the first anonymous tip on August 31, 2004, multiple law enforcement officers began periodic checks of the property. They saw the property as the multiple sources described it with windows covered and air conditioning units running inside. Furthermore, the officers attempted to conduct a thermal

imaging scan of the property. Although the scan provided inconclusive results, it did reveal air conditioning units running inside the property in cold weather, as multiple sources had indicated to police. While the information that the officers corroborated was not necessarily criminal in nature, it was consistent with a marijuana growing operation. Finally, the information that was corroborated by the officers in this case was not "publicly available" in the same sense as the information corroborated by the affiant in *Torres*, who simply corroborated the source by looking in the phone book.

¶ 20 We have reviewed the four corners of the affidavit filed in support of the search warrant for Appellant's Warren Street property. We conclude that the affidavit provided a substantial basis to support the issuing authority's finding of probable cause to search. Furthermore, because we conclude the search of the Warren Street property was legal, it follows that Appellant's claim that the evidence obtained from the Sterigere Street property is fruit from a poisonous tree also fails. Accordingly, we will not disturb the suppression court's denial of the motion to suppress. Appellant's first two issues are without merit.

¶ 21 In Appellant's final issue he claims that the evidence was not sufficient to support his conviction on Bill 9849.2 for possession of marijuana with intent to distribute. More specifically, Appellant argues the Commonwealth failed to establish the *corpus delicti* for the crimes charged on Bill 9849.2. Appellant

claims that the evidence the trial judge relied upon in finding him guilty was limited to his oral and written admissions that he possessed 21 to 50 marijuana plants between March 5, 2003 and October 30, 2004. He asserts that the court erred in relying on his admissions because there was no evidence presented that the crime occurred. He claims, therefore, that his admissions should not have been considered by the court in reaching its verdict. *See* Appellant's Brief at 29.

¶ 22 Initially, we point out that even though Appellant has framed his argument as a challenge to the sufficiency of the evidence, the *corpus delicti* rule applies to the admissibility of evidence. *See Commonwealth v. Dupre*, 866 A.2d 1089, 1097 (Pa. Super. 2005), *appeal denied*, 879 A.2d 781 (Pa. 2005). "Our standard of review on appeals challenging an evidentiary ruling of the trial court is limited to a determination of whether the trial court abused its discretion." *Id.* To the extent that Appellant's argument challenges the sufficiency of the evidence, we note that our standard of review for such claims is also limited:

The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt.

Commonwealth v. McCall, 911 A.2d 992, 996 (Pa. Super. 2006).

¶ 23 The *corpus delicti* rule provides that the Commonwealth bears a burden of showing that the charged crime actually occurred before a confession or admission by the accused can be admitted as evidence. *See Commonwealth v. Rivera*, 828 A.2d 1094, 1103 (Pa. Super. 2003), *appeal denied*, 842 A.2d 406 (Pa. 2004). “The *corpus delicti* [sic] is literally the body of the crime; it consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone.” *Id.* “The purpose of the *corpus delicti* rule is to guard against ‘the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed.’” *Commonwealth v. Edwards*, 903 A.2d 1139, 1158 (Pa. 2006), *quoting Commonwealth v. Reyes*, 681 A.2d 724, 727 (1996) (“*Reyes I*”).

¶ 24 In *Commonwealth v. Reyes*, 870 A.2d 888 (Pa. 2005) (“*Reyes II*”), our Supreme Court explained that Pennsylvania law requires courts to apply the *corpus delicti* rule in two phases:

In the first phase, the court determines whether the Commonwealth has proven the *corpus delicti* of the crimes charged by a preponderance of the evidence. If so, the confession of the defendant is admissible. In the second phase, the rule requires that the Commonwealth prove the *corpus delicti* to the fact-finder’s satisfaction beyond a reasonable

doubt before the factfinder is permitted to consider the confession in assessing the defendant's innocence or guilt.

Id. at 894 n.4 (citations omitted).

¶ 25 Pennsylvania has adopted an exception to the *corpus delicti* rule. This exception, known as the "closely related crimes" exception, provides:

[W]here a defendant's confession relates to separate crimes with which he is charged, and where independent evidence establishes the *corpus delicti* of only one of those crimes, the confession may be admissible as evidence of the commission of the other crimes. This exception applies only where the relationship between the crimes is sufficiently close so as to ensure that the purpose underlying the *corpus delicti* rule, *i.e.*, to prevent conviction where no crime has occurred, is not violated.

Dupre, 866 A.2d at 1099.

¶ 26 In the instant matter, the record reflects the following. The Commonwealth initially filed 23 separate Bills of Information charging Appellant with multiple violations of the Drug Act between the dates of March 5, 2003 and October 30, 2004. The location of these offenses was both the Warren Street and the Sterigere Street properties. The Commonwealth consolidated the charges into one Bill, number 9849.2, because all of the charges stemmed from a continuous course of conduct by Appellant. *See* N.T., 3/29/03, at 25-30.

¶ 27 Following his arrest, on October 27, 2004, Appellant made a statement to police in which he admitted that he had been growing and selling marijuana for over one and one-half years. Appellant argues that this statement should not have been admitted into evidence or considered by the court in reaching its verdict because the *corpus delicti* of the crime was not established. We disagree.

¶ 28 The record reflects that the Commonwealth introduced into evidence several photographs showing Appellant with marijuana plants. In addition, the Commonwealth introduced numerous calendars that had been found during the search of Appellant's properties. On these calendars, on specific dates, were handwritten notes indicating when plants were to be watered as well as projected harvesting dates and other information related to harvesting. These dates spanned from March 2003, through October 2004. Furthermore, the search of Appellant's Warren and Sterigere Street properties revealed multiple marijuana plants at these locations. This combined evidence was certainly sufficient to establish by a preponderance of the evidence that Appellant was involved in an ongoing operation of growing marijuana. Therefore, the *corpus delicti* was sufficiently proven and the court did not abuse its discretion in admitting Appellant's statement to police into evidence. Moreover, the combined evidence was sufficient to establish beyond a reasonable doubt that Appellant violated the Drug Act between March 2003 and October 2004. Therefore, we conclude that the

trial court did not act erroneously or abuse its discretion in considering Appellant's admission in reaching its verdict. **Reyes II.**

¶ 29 Furthermore, even if the *corpus delicti* for the crimes charged in Bill 9849.2 was not established by independent evidence, we nevertheless would affirm the trial court based on the "closely related crimes" exception. At the very least, Appellant's statement to the police was related to his other drug charges on Bills 9849 and 9849.1. The *corpus delicti* for those charges is not in dispute. Therefore, because independent evidence established the *corpus delicti* of the other crimes charged, Appellant's confession was properly considered as evidence for the closely related charges on Bill 9849.2. **Dupre.**

¶ 30 For the reasons set forth above, Appellant's conviction on Bill of Information 9849.2 was supported by sufficient evidence. Appellant's arguments to the contrary fail. Accordingly, we affirm the judgment of sentence.

¶ 31 Judgment of sentence affirmed.

Judgment Entered.

/s/ Karen Reid Bramblett
Prothonotary

Date: _____

2007 WL 4555270

Supreme Court of Pennsylvania.
COMMONWEALTH of Pennsylvania, Respondent
v. Patrick H. OTTERSON, Petitioner.
No. 961 MAL 2007.

Dec. 28, 2007.

Petition for Allowance of Appeal from the Order of the Superior Court entered August 21, 2007, at No. 1968 EDA 2006, affirming the Judgment of Sentence of the Court of Common Pleas of Montgomery County, Criminal Division, entered July 20, 2006, at No. CP-46-CR-0009849-2004.

ORDER

PER CURIAM.

AND NOW, this 28th day of December, the Petition for Allowance of Appeal is hereby **GRANTED**, the Order of the Superior Court is **VACATED**, and the matter is **REMANDED** to the Superior Court for consideration in light of ***Commonwealth v. Torres***, 764 A.2d 532 (Pa.2001).

COMMONWEALTH OF	:	IN THE SUPERIOR
PENNSYLVANIA,	:	COURT OF
Appellee	:	PENNSYLVANIA
v.	:	
PATRICK H. OTTERSON,	:	
Appellant	:	No. 1968 EDA 2006

ORDER

AND NOW, this 19th day of October, 2007, IT IS
HEREBY ORDERED:

THAT the application filed September 4, 2007, re-
questing reargument/reconsideration of the decision
dated August 21, 2007, is DENIED.

PER CURIAM

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
PATRICK H. OTTERSON,	:	
Appellant	:	No. 1968 EDA 2006

Appeal from the Judgment of Sentence July 20, 2006,
In the Court of Common Pleas of Montgomery County,
Criminal Division at No. CP-46-CR-0009849-2004.

BEFORE: LALLY-GREEN, GANTMAN and POPOVICH, JJ.

MEMORANDUM: **FILED AUGUST 21, 2007**

Appellant Patrick H. Otterson appeals from the judgment of sentence entered on July 20, 2006, in the Court of Common Pleas of Montgomery County, following his conviction for possession with intent to deliver ("PWID") marijuana,¹ violation of the Uniform Firearms Act,² and related offenses. Upon review, we affirm.

The relevant facts and procedural history of this case were fully set forth in the trial court opinion as follows:

¹ 35 P.S. § 780-113(a)(30).

² 18 Pa.C.S.A. § 6105 (persons not to possess, use, manufacture, control, sell or transfer firearms).

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On March 30, 2006, [Appellant] was convicted of three separate Bills of Information for violation of the Controlled Substance, Drug, Device, and Cosmetic Acts (the "Drug Act") and for possession of a firearm. The main Bill charged three counts of violation of the Drug Act for possession and manufacture of marijuana plants between October 27, 2004[,] and October 29, 2004[,] at 420 West Warren Street, Norristown, Montgomery County, Pennsylvania (hereinafter, the "Warren Street property"). Bill of Information 9849.1 charged the same counts for possession and manufacture of marijuana plants between October 29, 2004[,] and October 30, 2004[,] at 1202-1208 Sterigere Street, Norristown, Montgomery County, Pennsylvania (hereinafter, the "Sterigere Street property"). Bill of Information 9849.2 charged [Appellant] with the same three counts for continuous manufacture and possession of marijuana plants between March 5, 2003[,] and October 30, 2004[,] at both the Sterigere Street property and the Warren Street property. These convictions were the result of events that took place between October 27 and October 30, 2004.

On October 27, 2004, Officer Eugene Parsley of the Norristown Police Department executed a search warrant on the Warren Street property. As a result of the search, the police seized 64 marijuana plants, hydroponic lamps, two light timers, a timer for an air conditioner, duct work, and filter and fluorescent lights, among other items. The

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Affidavit of Probable Cause executed by Officer Parsley may be summarized as follows:

On August 31, 2004, Detective Michael Altieri of the Montgomery County Narcotics Enforcement Team received information from Upper Moreland Police Detective James Kelly that a confidential source provided him with information that the Warren Street property was abandoned, and that there was marijuana growing inside the residence at that location. The confidential source stated that he/she has seen marijuana plants growing in pots on the first floor inside that residence;

On August 31, 2004, Detective Altieri went to the Warren Street property to corroborate the information from Detective Kelly. It appeared that the property was locked up; the windows were all covered; and an air conditioner was running on the second floor, front;

A resident of the 400-block of West Warren Street told Detective Altieri that a white male lives at the Warren Street property on a part-time basis; that he drives a silver pick-up truck; only arrives once a week, stays for a couple of hours and then leaves;

Periodic checks of the property by the police revealed that the lights on the first floor stayed on all night. A check of the entire neighborhood by the police failed to locate the pick-up truck;

The detective learned that [Appellant] is the lessee of 420 West [Warren] Street, Norristown, Pennsylvania, and that [Appellant] had been arrested in the past for possession of a small amount of marijuana;

On September 14, 2004, an anonymous female called the Norristown Police to report that marijuana was being grown inside the Warren Street property; that no one lives there, and that it was just a "front." In response to the call, Officer Christopher Narkin went to the location and observed that the residence was locked up, and the windows were covered so no one could see inside. He reported his findings to Detective Altieri because he felt that there was something suspicious about how the residence was covered up;

On September 16, 2004, a second anonymous female called Detective Altieri and stated that marijuana was growing inside the Warren Street property. She said that a

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white male arrives about once a week and removes large trash bags from the residence under the cover of darkness and loads them onto his pick-up truck, that the air conditioners and lights operate on a timer, and that the man does not live there. She also said that one of the neighbors has seen marijuana growing on the first floor and that she and the neighbors feared for their safety and preferred to remain anonymous for this reason;

Periodic checks of the property by the investigating police officers during the month prior to the issuance of the search warrant on October 27, 2004[,] failed to reveal any sign of [Appellant] or the pick-up truck. Yet, the lights were seen to be always lit on the first floor, the windows and doors were covered up and the air conditioner was running on the second floor, even in extremely cool weather.

On October 8, 2004, [the trial court] issued a sealed search warrant for the use of a thermal imaging device at the Warren Street property.

On October 12, 2004, the thermal imaging scan was conducted, but due to the cold weather conditions (surrounding properties had their

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heat on), an accurate reading could not be obtained. Two air conditioners on the second floor were running, despite the cold weather;

On October 27, 2004, Detective Jeffrey Koch reported to Detective Altieri that an unknown female had telephoned the Drug Tip Hotline and left a message that marijuana was growing inside the Warren Street property; that no one lives there; that a suspicious male goes to the residence periodically; and that the neighbors have smelled strange odors emanating from the property;

On October 27, 2004, Officer Parsley and Detective Altieri spoke to a confidential informant who told them that he/she smelled the strong odor of "skunk weed" or "homegrown" marijuana coming from the Warren Street property;

On October 27, 2004, Officer Parsley and Detective Altieri also spoke to another confidential informant who reported that he/she personally had seen marijuana growing inside the Warren Street property. This person also said that, after the police began to investigate the property in late August, the occupant appeared to clear up the overgrown weeds and also covered the windows more

thoroughly so no one could see inside. The confidential informant also said the air conditioners still go on every night, even with the cold weather;

Both confidential informants said that the occupant only comes to the residence periodically and that he "hasn't been seen there since last week."

While the officers were executing the search warrant at the Warren Street property, [Appellant] arrived. Upon seeing the officers, [Appellant] fled, but was apprehended with his girlfriend a short time later. That same night, [Appellant] was arrested and read his **Miranda** warnings. He gave a statement admitting that he had harvested approximately 50 marijuana plants four months earlier. [Appellant] th[e]n signed a consent to search form for another one of his residences located at 2804 Village Green Lane, Norristown, Montgomery County, Pennsylvania. As a result of this search, the police seized calendars denoting different harvest dates. Many of these harvest dates overlapped[,] suggesting that [Appellant] had more than one location where he [grew] marijuana. The calendars included harvest dates between March 5, 2003[,] and October 30, 2004. The calendars and [Appellant's] statement formed the basis for [Appellant's] conviction on Bill of Information 9849.2.

On October 29, 2004, Detective Altieri executed a search warrant on the Sterigere Street property, the address shown on [Appellant's] driver's license. As a result of the search, the police seized a total of 121 potted marijuana plants, calendars, hydroponic lamps, and a double barrel shotgun, among other items.

...

Subsequently, [Appellant] filed a motion to suppress the evidence seized pursuant to the search warrants. A hearing on this motion was held on November 3, 2005[,] in front of the Honorable William T. Nicholas. On December 5, 2005, Judge Nicholas entered an Order denying [Appellant's] motion and placed his findings of fact and conclusions of law on the record. [Appellant's] trial was held on March 29, 2006[,] and March 30, 2006. The [trial court] found [Appellant] guilty of the three Bills of Information charging [Appellant] [with] violations of the Drug Act. On July 25, 2006, [Appellant] was sentenced to not less than 5 years on the main Bill, not less than 5 years on Bill of Information 9849.1 and 3 to 5 years on Bill of Information 9849.2. These sentences were to run concurrent with one another. [The trial court] also sentenced [Appellant] to 1 to 5 years for possession of a firearm to run consecutive with the other sentences. [Appellant] appealed his judgment of sentence on July 25, 2006. In accordance with [Rule] 1925(b) of the Pennsylvania Rules of

Appellate Procedure, [the trial court] directed [Appellant] to file a Concise Statement of Matters Complained of on Appeal no later than August 8, 2006. Appellant filed such statement on August 4, 2006.

Trial Court Opinion, 9/5/2006, at 1-5 (footnotes omitted).

On appeal, Appellant presents the following issues for our review:

1. Did the [trial court] err in denying the Appellant's Motion to Suppress Evidence seized as the result of an execution of a search warrant which lacked probable cause for 420 W. Warren Street, Norristown, PA?
2. Did the [trial court] err in denying the Appellant's Motion to Suppress evidence seized at 1202 Sterigere Street, Norristown, PA which was tainted by the illegal search and seizure conducted at 420 W. Warren Street and which was not supported by independent and lawfully acquired probable cause?
3. Was the evidence insufficient as a matter of law to establish the Appellant's guilt beyond a reasonable doubt on Bill No. 9849.2 where the [Commonwealth] did not establish that a *corpus delicti* existed as to this offense?

Appellant's Brief, at 4.

In his first and second issues, Appellant challenges the trial court's denial of his motion to suppress. Appellant first argues that the affidavit of probable cause was not sufficient to support the search warrant for the Warren Street property. Specifically, Appellant asserts that the confidential informants did not have a history of reliability, there was no showing of how the informants acquired their information, and the information was not corroborated by independent police investigation. *See* Appellant's Brief at 11. In a related argument, Appellant asserts that because the search of the Warren Street property was improper, the warrant obtained for the Sterigere Street property was unlawful as "fruit of a poisonous tree." *Id.* at 20. Our review of such claims is governed by the following, well established, standards:

Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Brown, 2007 PA Super 149, ¶ 6, quoting **Commonwealth v. Reppert**, 814 A.2d 1196, 1200 (Pa. Super 2002).

We have thoroughly reviewed the certified record, the parties' briefs, and the findings of fact and conclusions of law issued by Judge William T. Nicholas, dated December 5, 2005. The record reveals support for Judge Nicholas's findings of fact and we are satisfied that the legal conclusions drawn from those facts are not erroneous. Therefore, we adopt Judge Nicholas's analysis related to the legitimacy of the warrant for the Warren Street property as our own. **See Findings of Fact, Conclusions of Law and Order Sur Defendant's Motion to Suppress Evidence**, 12/5/05, at 1-7, 12. Furthermore, because we conclude that the search of the Warren Street property was legal, it follows that Appellant's claim that the evidence obtained from the Sterigere Street property is fruit from a poisonous tree also fails. Accordingly, we will not disturb the suppression court's denial of the motion to suppress. Appellant's first two issues are without merit.

In Appellant's final issue he claims that the evidence was not sufficient to support his conviction on Bill 9849.2 for possession of marijuana with intent to distribute. More specifically, Appellant argues the Commonwealth failed to establish the *corpus delicti* for the crimes charged on Bill 9849.2. Appellant claims that the evidence the trial judge relied upon in finding him guilty was limited to his oral and written admissions that he possessed 21 to 50 marijuana

plants between March 5, 2003 and October 30, 2004. He asserts that the court erred in relying on his admissions because there was no evidence presented that the crime occurred. He claims, therefore, that his admissions should not have been considered by the court in reaching its verdict. *See* Appellant's Brief at 29.

Initially, we point out that even though Appellant has framed his argument as a challenge to the sufficiency of the evidence, the *corpus delicti* rule applies to the admissibility of evidence. *See Commonwealth v. Dupre*, 866 A.2d 1089, 1097 (Pa. Super. 2005), *appeal denied*, 879 A.2d 781 (Pa. 2005). "Our standard of review on appeals challenging an evidentiary ruling of the trial court is limited to a determination of whether the trial court abused its discretion." *Id.* To the extent that Appellant's argument challenges the sufficiency of the evidence, we note that our standard of review for such claims is also limited:

The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt.

Commonwealth v. McCall, 911 A.2d 992, 996 (Pa. Super. 2006).

The *corpus delicti* rule provides that the Commonwealth bears a burden of showing that the

charged crime actually occurred before a confession or admission by the accused can be admitted as evidence. *See Commonwealth v. Rivera*, 828 A.2d 1094, 1103 (Pa. Super. 2003), *appeal denied*, 842 A.2d 406 (Pa. 2004). “The *corpus delicti* [sic] is literally the body of the crime; it consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone.” *Id.* “The purpose of the *corpus delicti* rule is to guard against ‘the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed.’” *Commonwealth v. Edwards*, 903 A.2d 1139, 1158 (Pa. 2006), quoting *Commonwealth v. Reyes*, 681 A.2d 724, 727 (Pa. 1996) (“*Reyes I*”).

In *Commonwealth v. Reyes*, 870 A.2d 888 (Pa. 2005) (“*Reyes II*”), our Supreme Court explained that Pennsylvania law requires courts to apply the *corpus delicti* rule in two phases:

In the first phase, the court determines whether the Commonwealth has proven the *corpus delicti* of the crimes charged by a preponderance of the evidence. If so, the confession of the defendant is admissible. In the second phase, the rule requires that the Commonwealth prove the *corpus delicti* to the factfinder’s satisfaction beyond a reasonable doubt before the factfinder is permitted to consider the confession in assessing the defendant’s innocence or guilt.

Id. at 894 n.4 (citations omitted).

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Pennsylvania has adopted an exception to the *corpus delicti* rule. This exception, known as the "closely related crimes" exception, provides that:

[W]here a defendant's confession relates to separate crimes with which he is charged, and where independent evidence establishes the *corpus delicti* of only one of those crimes, the confession may be admissible as evidence of the commission of the other crimes. This exception applies only where the relationship between the crimes is sufficiently close so as to ensure that the purpose underlying the *corpus delicti* rule, *i.e.*, to prevent conviction where no crime has occurred, is not violated.

Dupre, 866 A.2d at 1099.

In the instant matter, the record reflects the following. The Commonwealth initially filed 23 separate Bills of Information charging Appellant with multiple violations of the Drug Act between the dates of March 5, 2003 and October 30, 2004. The location of these offenses was both the Warren Street and the Sterigere Street properties. The Commonwealth consolidated the charges into one Bill, number 9849.2, because all of the charges stemmed from a continuous course of conduct by Appellant. *See* N.T., 3/29/03, at 25-30.

Following his arrest, on October 27, 2004, Appellant made a statement to police in which he admitted that he had been growing and selling marijuana for over one and one-half years. Appellant argues that this statement should not have been admitted into

evidence or considered by the court in reaching its verdict because the *corpus delicti* of the crime was not established. We disagree.

The record reflects that the Commonwealth introduced into evidence several photographs showing Appellant with marijuana plants. In addition, the Commonwealth introduced numerous calendars that had been found during the search of Appellant's properties. On these calendars, on specific dates, were handwritten notes indicating when plants were to be watered as well as projected harvesting dates and other information related to harvesting. These dates spanned from March 2003, through October 2004. Furthermore, the search of Appellant's Warren and Sterigere Street properties revealed multiple marijuana plants at these locations. This combined evidence was certainly sufficient to establish by a preponderance of the evidence that Appellant was involved in an ongoing operation of growing marijuana. Therefore, the *corpus delicti* was sufficiently proven and the court did not abuse its discretion in admitting Appellant's statement to police into evidence. Moreover, the combined evidence was sufficient to establish beyond a reasonable doubt that Appellant violated the Drug Act between March 2003 and October 2004. Therefore, we conclude that the trial court did not act erroneously or abuse its discretion in considering Appellant's admission in reaching its verdict. **Reyes II.**

Furthermore, even if the *corpus delicti* for the crimes charged in Bill 9849.2 was not established by

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independent evidence, we nevertheless would affirm the trial court based on the "closely related crimes" exception. At the very least, Appellant's statement to the police was related to his other drug charges on Bills 9849 and 9849.1. The *corpus delicti* for those charges is not in dispute. Therefore, because independent evidence established the *corpus delicti* of the other crimes charged, Appellant's confession was properly considered as evidence for the closely related charges on Bill 9849.2. **Dupre.**

For the reasons set forth above, Appellant's conviction on Bill of Information 9849.2 was supported by sufficient evidence. Appellant's arguments to the contrary fail. Accordingly, we affirm the judgment of sentence, in part on the basis of the suppression court's findings of fact and conclusions of law.

Judgment of sentence affirmed.

Popovich, J. files a Dissenting Memorandum.

Judgment Entered.

/s/ Karen Reid Bramblett
Prothonotary

Date: _____

FILED AUGUST 21, 2007

DISSENTING MEMORANDUM BY POPOVICH, J.:

Respectfully, I dissent from the Majority's affirmation of the trial court's denial of Appellant's suppression motion. Based upon my review of the record, I would reverse the trial court's order and suppress the evidence obtained from the search of both the Warren Street property and the Sterigere Street property and would remand the case to the trial court. Consequently, I would not reach Appellant's final issue regarding the *corpus delicti* rule.

When testing the sufficiency of an affidavit to obtain a search warrant, this Court applies the following guidelines:

Before an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search. The information offered to demonstrate probable cause must be viewed in a common sense, nontechnical, ungrudging and positive manner. It must also be remembered that probable cause is based on a finding of the probability, not a *prima facie* showing of criminal activity, and that deference is to be accorded a magistrate's finding of probable cause. [. . .]. And the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for [. . .] concluding that probable cause existed.

Commonwealth v. Wilkinson, 647 A.2d 583, 585-86 (Pa. Super. 1994) (citations and quotation marks omitted).¹ Additionally, the propriety of the issuance of a search warrant to an affiant must be judged solely upon the information before the magisterial district judge at the time of its issuance. *Id.*, 647 A.2d at 586 (citation and quotation marks omitted). Consequently, the magistrate's decision must be based on the four corners of the affidavit in support of the issuance of the warrant. *Id.*, 647 A.2d at 586 (citation and quotation marks omitted).

Often, the basis for issuing a search warrant arises from information provided to police by an informant's tip. The reliability of an informant should be established by some objective facts that would enable any court to conclude that the informant was reliable. *See Commonwealth v. Smith*, 784 A.2d 182, 187 (Pa. Super. 2001) (citation omitted). To that end, the informant's veracity, reliability, and basis of knowledge must be assessed by the magistrate who is to issue the search warrant. *In the Interest of O.A.*, 552 Pa. 666, 676, 717 A.2d 490, 495 (1998) (plurality).² Where the reliability of the informant is not established, the totality of the circumstances surrounding the tip must provide sufficient indicia of

¹ This test is known as the "totality of the circumstances" test. *See Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (1985).

² Although *In the Interest of O.A.* was a plurality decision of our Supreme Court, I note that its reasoning was adopted by this Court in *Smith*. *See, Smith*, 784 A.2d at 187.

reliability to support a finding of probable cause. **Smith**, 784 A.2d at 187. Corroboration by police investigation of the details of an informant's tip can provide sufficient indicia of reliability to an otherwise unreliable tip. **In the Interest of O.A.**, at 680, 717 A.2d at 497. On this subject, our Supreme Court has held the following:

When police are relying on an informant's tip, it is important that the tip provide information that demonstrates "inside information" [which represents] a special familiarity with the defendant's affairs. If the tip provides inside information, then police corroboration of this inside information can impart additional reliability to the tip. If the facts that are supplied by the tip itself are no more than those easily obtained, then the fact that the police corroborated them is of no moment. It is only where the facts provide inside information, which represent[s] a special familiarity with a defendant's affairs, that police corroboration of the information imparts indicia of reliability to the tip to support a finding of probable cause. Thus, police corroboration of an informant's tip enhances the indicia of reliability and thereby strengthens the determination that the facts and circumstances surrounding the tip warrant a finding of probable cause.

In the Interest of O.A., at 681-82, 717 A.2d at 498 (citations omitted); *see also Smith*, 784 A.2d at 187 (citing **In the Interest of O.A.**, at 681-82, 717 A.2d at 498).

I cannot conclude that the magisterial district judge's decision to issue a search warrant was supported by sufficient information. In my view, except for the informants who stated that they saw marijuana being grown inside the Warren Street property, the four corners of the affidavit fail to demonstrate the informants' bases of knowledge regarding Appellant's alleged criminal activity therein. Likewise, my reading of the affidavit demonstrates that the affidavit fails to show the reliability of the informants on its face. The Commonwealth concedes these points, but it asserts that the tips set forth in the affidavit were reliable and, therefore, generated probable cause because they were corroborated by independent police investigation. *See Smith*, 784 A.2d at 187. My review of the affidavit indicates that the only facts corroborated by the police *via* their investigation were as follows: (1) Appellant was not present at the Warren Street property during their investigation, despite his status as lessee of the property; (2) the air conditioners and lights were on continuously at night, despite Appellant's absence; (3) the windows were covered; and (4) the Warren Street property was locked. I would conclude that these facts are non-criminal in nature, were easily obtained by the police, and do not point with a high degree of probability that Appellant was engaged in a marijuana growing operation. Consequently, I would also conclude that the affidavit was, on its face, insufficient to support the issuance of a search warrant of the Warren Street property. *Id.*, 784 A.2d at 187 (citing *In the Interest of O.A.*, at 681-82, 717 A.2d at 498). Indeed, my

reading the affidavit indicates that none of the informants' allegations of criminal activity were ever corroborated by police investigation.

Nevertheless, as the Commonwealth argues, the credibility of an anonymous "concerned citizen" tip is difficult to evaluate, but an otherwise unreliable tip may be rendered reliable and, thus, supportive of probable cause if corroborated by a second, independent tip. *See Commonwealth v. Cramutola*, 676 A.2d 1214, 1216-17 (Pa. Super. 1996). Despite this principle, it is my belief that, in the present case, the tips from anonymous "concerned citizens" and the tips from the confidential informants presented information that was substantially similar to each other. Based on the similarity of these tips, I am led to the conclusion that these tips provided information that could have been obtained easily by the police and were, therefore, not sufficient to form the basis for a warrant. *Smith*, 784 A.2d at 187 (citing *In the Interest of O.A.*, at 681-82, 717 A.2d at 498) (If facts that are supplied by the tip itself are no more than those easily obtained, then the fact that the police corroborated them is of no moment.). Consequently, I cannot join in the Majority's conclusion that the allegations within the affidavit were sufficient for the issuance of a search warrant for the Warren Street property. *Id.*, 784 A.2d at 187 (citing *In the Interest of O.A.*, at 681-82, 717 A.2d at 498). Therefore, I would conclude the evidence obtained from the search should have been suppressed by the trial court.

Based on my above conclusion, I would also find that the evidence obtained from the search of the Sterigere Street property was the "fruit of the poisonous tree." *See, e.g., Commonwealth v. Hernandez*, 892 A.2d 11, 20 (Pa. Super. 2006). My review of the facts of this case indicates that the police learned of the Sterigere Street property only after Appellant was arrested at the Warren Street property following the illegal search, provided a statement (not referring to the Sterigere Street property), and gave permission to the police to search his primary residence at 2804 Village Green Lane, Lower Providence Township, whereat the police discovered three different calendars indicating different marijuana harvest dates. Thereafter, the police learned from Appellant's driver's license that Appellant also had an address at the Sterigere Street property. Accordingly, I would find that the information regarding the three harvest dates (and three possible growing locations) in Appellant's primary residence would not have been obtained save for Appellant's arrest and statement stemming from the illegal search of the Warren Street property.

The Commonwealth alleges that the evidence obtained from Sterigere Street would have been discovered inevitably and, therefore, it was purged of its taint of illegality. *See, e.g., Commonwealth v. Ingram*, 814 A.2d 264, 272 (Pa. Super. 2002). I do not find this argument convincing. My review of the affidavit for the Warren Street property indicates that the affidavit does not mention the Sterigere

Street property, despite the information on Appellant's driver's license (which information the police had access to prior to the execution of the Warren Street search). Likewise, my review of the record indicates that the suspicion that marijuana was growing at the Sterigere Street property arose only after the police obtained Appellant's permission to search his primary residence after his arrest at the Warren Street property and found in his primary residence the three calendars with differing harvest dates (implying three different growing locations). Consequently, I would conclude that the evidence obtained from the Sterigere Street property would not have been discovered inevitably but, instead, was the fruit of the search and arrest at the Warren Street property. Consequently, I would find that *all* evidence obtained as a result of the search and arrest at the Warren Street property, including that obtained from the search of the Sterigere Street property, must be suppressed as fruits of the poisonous tree. *Hernandez*, 892 A.2d at 20. Based upon my finding that all evidence obtained from Appellant's arrest and statement following the illegal search of the Warren Street property should have been suppressed, I would reverse the case and would not reach Appellant's third issue.

As such, I dissent from the memorandum of the learned Majority.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL ACTION

COMMONWEALTH : NO. 9849-04
OF PENNSYLVANIA

v. :
PATRICK OTTERSON : 1968 EDA 2006

OPINION

HODGSON, J. September 1, 2006

The Appellant, Patrick Otterson, appeals his judgment of sentence imposed upon him by this Court on July 20, 2006.

FACTS AND PROCEDURAL HISTORY

On March 30, 2006, the Appellant was convicted of three separate Bills of Information for violation of the Controlled Substance, Drug, Device and Cosmetic Acts (the "Drug Act") and for possession of a firearm. The main Bill charged three counts of violation of the Drug Act for possession and manufacture of marijuana plants between October 27, 2004 and October 29, 2004 at 420 West Warren Street, Norristown, Montgomery County, Pennsylvania (hereinafter, the "Warren Street property"). Bill of Information 9849.1 charged the same counts for possession and manufacture of marijuana plants between October 29, 2004 and October 30, 2004 at 1202-1208 Sterigere Street, Norristown, Montgomery County,

Pennsylvania (hereinafter, the "Sterigere Street property"). Bill of Information 9849.2 charged the Appellant with the same three counts for continuous manufacture and possession of marijuana plants between March 5, 2003 and October 30, 2004 at both the Sterigere Street property and the Warren Street property. These convictions were the result of events that took place between October 27 and October 30, 2004.

On October 27, 2004, Officer Eugene Parsley of the Norristown Police Department executed a search warrant on the Warren Street property. As a result of the search, the police seized 64 marijuana plants, hydroponic lamps, two light timers, a timer for an air conditioner, duct work, and filter and fluorescent lights, among other items. The Affidavit of Probable Cause executed by Officer Parsley may be summarized as follows:

- On August 31, 2004, Detective Michael Altieri of the Montgomery County Narcotics Enforcement Team, received information from Upper Moreland Police Detective James Kelly that a confidential source provided him with information that the Warren Street property was abandoned, and that there was marijuana growing inside the residence at that location. The confidential source stated that he/she has seen marijuana plants growing in pots on the first floor inside that residence;

- On August 31, 2004, Detective Altieri went to the Warren Street property to corroborate the information from Detective Kelly. It appeared that the property was locked up; the windows were all covered; and an air conditioner was running on the second floor, front;
- A resident of the 400-block of West Warren Street told Detective Altieri that a white male lives at the Warren Street property on a part-time basis; that he drives a silver pick-up truck; only arrives once a week, stays for a couple of hours and then leaves;
- Periodic checks of the property by the police revealed that the lights on the first floor stayed on all night. A check of the entire neighborhood by the police failed to locate the pick-up truck;
- The detective learned that the Appellant is the lessee of 420 West Wood (sic)¹ Street, Norristown, Pennsylvania, and that the Appellant had been arrested in the past for possession of a small amount of marijuana;
- On September 14, 2004, an anonymous female called the Norristown police to report that marijuana was being grown

¹ Officer Parsley testified that this was a typographical error and should have read West Warren Street (N.T., Suppression Hearing, p. 22).

inside the Warren Street property; that no one lives there, and that it was just a "front." In response to the call, Officer Christopher Narkin went to the location and observed that the residence was locked up, and the windows were covered so no one could see inside. He reported his findings to Detective Altieri because he felt that there was something suspicious about how the residence was covered up;

- On September 16, 2004, a second anonymous female called Detective Altieri and stated that marijuana was growing inside the Warren Street property. She said that a white male arrives about once a week and removes large trash bags from the residence under the cover of darkness and loads them onto his pick-up truck, that the air conditioners and lights operate on a timer, and that the man does not live there. She also said that one of the neighbors has seen marijuana growing on the first floor and that she and the neighbors feared for their safety and preferred to remain anonymous for this reason;
- Periodic checks of the property by the investigating police officers during the month prior to the issuance of the search warrant on October 27, 2004 failed to reveal any sign of the Appellant or the pick-up truck. Yet, the lights were seen to be always lit on the first floor, the

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windows and doors were covered up and the air conditioner was running on the second floor, even in extremely cool weather;

- On October 8, 2004, this Court issued a sealed search warrant for the use of a thermal imaging device at the Warren Street property.²
- On October 12, 2004, the thermal imaging scan was conducted, but due to the cold weather conditions, (surrounding properties had their heat on), an accurate reading could not be obtained. Two air conditioners on the second floor were running, despite the cold weather;
- On October 27, 2004, Detective Jeffrey Koch reported to Detective Altieri that an unknown female had telephoned the Drug Tip Hotline and left a message that marijuana was growing inside the Warren Street property; that no one lives there; that a suspicious male goes to the residence periodically; and that the neighbors have smelled strange odors emanating from the property;
- On October 27, 2004, Officer Parsley and Detective Altieri spoke to a confidential informant who told them that he/she smelled the strong odor of "skunk weed"

² This warrant is not being challenged on appeal.

or "homegrown" marijuana coming from the Warren Street property;

- On October 27, 2004, Officer Parsley and Detective Altieri also spoke to another confidential informant who reported that he/she personally had seen marijuana growing inside the Warren Street property. This person also said that, after the police began to investigate the property in late August, the occupant appeared to clear up the overgrown weeds and also covered the windows more thoroughly so no one could see inside. The confidential informant also said the air conditioners still go on every night, even with the cold weather;
- Both confidential informants said that the occupant only comes to the residence periodically and that he "hasn't been seen there since last week."

While the officers were executing the search warrant at the Warren Street property, the Appellant arrived. Upon seeing the officers, the Appellant fled, but was apprehended with his girlfriend a short time later. That same night, the Appellant was arrested and read his *Miranda* warnings. He gave a statement admitting that he had harvested approximately 50 marijuana plants four months earlier. The Appellant then signed a consent to search form for another one of his residences located at 2804 Village Green Lane, Norristown, Montgomery County, Pennsylvania. As a result of this search, the police seized

calendars denoting different harvest dates. Many of these harvest dates overlapped suggesting that the Appellant had more than one location where he grows marijuana. The calendars included harvest dates between March 5, 2003 and October 30, 2004. The calendars and the Appellant's statement formed the basis for the Appellant's conviction on Bill of Information 9849.2.

On October 29, 2004, Detective Altieri executed a search warrant on the Sterigere Street property, the address shown on Otterson's driver's license. As a result of the search, the police seized a total of 121 potted marijuana plants, calendars³, hydroponic lamps, and a double barrel shotgun, among other items. The Affidavit of Probable Cause executed by Detective Altieri may be summarized as follows.

- The search of the Warren Street property revealed a large-scale marijuana growing operation conducted by the Appellant;
- The Appellant gave a statement admitting his marijuana growing operation;
- The Appellant consented to a search of his residence at 2804 Village Green Lane, and the search was conducted at approximately 1:00 a.m. on October 29, 2004. Among the items seized were three

³ These calendars also formed the basis for the Appellant's conviction on Bill of Information 9849.2

calendars denoting different harvest dates, leading to the belief that the Appellant has more than one location where he grows marijuana;

- On October 29, 2004, Detective Altieri proceeded to the Sterigere Street property, the address shown on the Appellant's driver's license. The windows and doors were all covered up as they were at the Warren Street property and newer air conditioners were in the upper windows. One of the Appellant's keys, taken from him at the time of his arrest, opened the front door, but police did not enter until they had obtained a search warrant;
- While standing at the front door of the residence, Detective Alfieri could smell the distinctive odor of marijuana. The property was not enclosed by a fence or any other barrier.

Subsequently, the Appellant filed a motion to suppress the evidence seized pursuant to the search warrants. A hearing on this motion was held on November 3, 2005 in front of the Honorable William T. Nicholas. On December 5, 2005, Judge Nicholas entered an Order denying the Appellant's motion and placed his findings of fact and conclusions of law on the record. The Appellant's trial was held on March 29, 2006 and March 30, 2006. The undersigned found the Appellant guilty of the three Bills of Information charging the Appellant was violations of the Drug

Act. On July 25, 2006, the Appellant was sentenced to not less than 5 years on the main Bill, not less than 5 years on Bill of Information 9849.1 and 3 to 5 years on Bill of Information 9849.2. These sentences were to run concurrent with one another. We also sentenced the Defendant to 1 to 5 years for possession of a firearm to run consecutive with the other sentences. The Appellant appealed his judgment of sentence on July 25, 2006. In accordance with Section 1925(b) of the Pennsylvania Rules of Appellate Procedure, we directed the Appellant to file a Concise Statement of Matters Complained of on Appeal no later than August 8, 2006. The Appellant filed such statement on August 4, 2006.

LEGAL DISCUSSION

On appeal, the Appellant asserts that

- This court erred in denying the Appellant's pretrial motion to suppress evidence seized pursuant to the search warrants. The Appellant asserts that the search warrants were obtained in violation of his federal and state constitutional rights because the warrants were not supported by sufficient probable cause. Further, the search warrant for Sterigere Street property was also the fruit of the poisonous tree inasmuch as it was based upon information derived from the illegal search of the Warren Street property;

- The Commonwealth failed to present sufficient evidence of the Appellant's guilt with respect to Bill of Information 9849.2 because the prosecution failed to prove beyond a reasonable doubt that there was a corpus delecti as to this offense existing independent of the Appellant's oral and written admission as no marijuana was recovered to support this charge.

Search Warrants

With regard to this issue, we adopt the cogent and comprehensive reasoning of the Honorable William T. Nicholas as set forth in his Findings of Fact and Conclusions of Law entered on December 5, 2005 and, therefore, we need not issue another full opinion in accordance with Rule of Appellate Procedure 1925(a).⁴

Corpus Delecti

The Appellant argues that the Commonwealth failed to present sufficient evidence of the Appellant's guilt with respect to Bill of Information 9849.2 because the prosecution failed to prove beyond a reasonable doubt that there was a corpus delecti as to

⁴ A copy of the Court's Findings of Fact, Conclusions of Law and Order Sur Defendant's Motion to Suppress Evidence is attached to this opinion.

this offense existing independent of the Appellant's oral and written admission because no marijuana was recovered to support this charge.

The *corpus delecti* is literally the body of a crime. It consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone. *Comm v. Dupre*, 866 A.2d 1089, 1097-98 (Pa. Super. 2005). The historical purpose of the rule is to prevent a conviction based solely on the incriminatory statement of the accused. *Id.* In order to establish the *corpus delecti*, the Commonwealth must have independent evidence that a crime has been committed before an incriminating statement of the accused is admissible. Contrary to the Appellant's assertion, the Commonwealth need not prove the existence of a crime beyond a reasonable doubt to establish the *corpus delecti*. Rather, the Commonwealth must show that it is more likely than not that a crime has actually occurred. *Id.*

In the instant matter, the independent evidence is highly indicative of criminal activity and is more consistent with a crime actually occurring than not. A search of both the Warren Street property and the Sterigere Street property revealed over 50 marijuana plants. A search of the 2804 Village Green Lane Property and the Sterigere property revealed several calendars all illustrating projected harvest and harvest dates. These dates stretched from March 2003 through October 2004. These facts are sufficient to establish *corpus delecti* that the Appellant had engaged in marijuana growth activities prior to the

actual search of these properties. Accordingly, the Commonwealth has properly met its burden.

CONCLUSION

Based on the foregoing, the Appellant's Judgment of Sentence should be AFFIRMED.

BY THE COURT:

/s/ Ricard J. Hodgson

Copies sent 09/1/06 to:

By Interoffice Mail:

Robert J. Sander, Esquire,
Assistant District Attorney

By Certified Mail:

Burton A. Rose, Esquire,
Attorney for the Appellant

/s/ Phyllis Twist
Judicial Secretary

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH : NO. 09849-04
OF PENNSYLVANIA

Vs. :

PATRICK OTTERSON :

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER SUR DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE**

AND NOW, this 5th day of December, 2005, after hearing before the undersigned on November 3, 2005, pursuant to Pa.R.Crim.P. 581, and consideration of the briefs of counsel, based upon the following findings of fact and conclusions of law, the defendant's Motion to Suppress Evidence is hereby DENIED.

FINDINGS OF FACT

**SEARCH WARRANT FOR
420 W. WARREN STREET, NORRISTOWN, PA**

1. The search warrant issued by Magisterial District Judge Francis Bernhardt on October 27, 2004 for 420 West Warren Street, Norristown, PA, (Exhibit C-1) a two-story row home leased by the defendant, was properly issued, as it was supported by probable cause that an illegal marijuana growing operation was ongoing inside the premises.

2. The four corners of the Affidavit of Probable Cause, when reviewed in a common sense, non-technical, practical manner, as we are required to do, is sufficient to support a belief that it was fairly probable, given the totality of the circumstances presented therein, that the property was then being utilized to grow marijuana.

3. The Affidavit of Norristown Police Officer Eugene Parsley, an experienced drug law enforcement officer, consisting of ten pages, may be summarized as follows:

(a) on August 31, 2004, Detective Michael Altieri of the Montgomery County Narcotics Enforcement Team, received information from Upper Moreland Police Detective James Kelly that a confidential source provided him with information that 420 West Warren Street was abandoned, and that there was marijuana growing inside the residence at that location. The confidential source stated that he/she has seen marijuana plants growing in pots on the first floor inside that residence;

(b) Detective Altieri went to the location on August 31, 2004 to corroborate the information from Detective Kelly. It appeared that the property was locked up; the windows were all covered; and an air conditioner was running on the second floor, front;

(c) a resident of the 400-block of West Warren Street told Detective Altieri that a white male lives at 420 West Warren Street

on a part-time basis; that he drives a silver pick-up truck; only arrives once a week, stays for a couple of hours and then leaves;

(d) periodic checks of the property by the police revealed that the lights on the first floor stayed on all night. A check of the entire neighborhood by the police failed to locate the pick-up truck;

(e) Detective Altieri learned that the defendant is the lessee of 420 West Wood (sic)¹ Street, Norristown, PA, and that the defendant had been arrested in the past for possession of a small amount of marijuana;

(f) on September 14, 2004, an anonymous female called the Norristown police to report that marijuana was being grown inside 420 West Warren Street; that no one lives there, and that it was just a "front". Officer Christopher Narkin went to the location and observed that the residence was all locked up, and the windows were all covered so no one could see inside. Officer Narkin reported this to Detective Altieri, as he felt that there was something suspicious about how the residence was all covered up;

(g) on September 16, 2004, a second anonymous female called Detective Altieri and stated that marijuana was growing inside the residence at 420 West Warren

¹ This was a typographic error. (N.T. Suppression Hearing, p. 22).

Street. She said that a white male arrives about once a week and removes large trash bags from the residence under cover of darkness and loads them onto his pick-up truck. She said that the air conditioners and lights operate on a timer, and that the man does not live there. She also said that one of the neighbors has seen marijuana growing on the first floor. She said that she and the neighbors feared for their safety and preferred to remain anonymous for this reason;

(h) periodic checks of the property by the investigating police officers during the month prior to the issuance of the search warrant on October 27, 2004 failed to reveal any sign of the defendant Otterson or the pick-up truck. Yet, the lights were seen to be always lit on the first floor; the windows and doors were all covered up and the air conditioner was running on the second floor, even with extremely cool weather;

(i) hydroponic lamps, which give off excessive heat, are used to grow marijuana indoors. Air conditioners may be used to offset the heat from the lamps;

(j) on October 8, 2004, the undersigned issued a sealed search warrant for the use of a thermal imaging device at 420 West Warren Street. This warrant was not challenged;

(k) on October 12, 2004, the thermal imaging scan was conducted, but, due to the cold weather conditions (surrounding properties had their heat on), an accurate reading

could not be obtained. Two air conditioners on the second floor were running, despite the cold weather;

(l) on October 27, 2004, Detective Jeffrey Koch reported to Detective Altieri that an unknown female had telephoned the Drug Tip Hotline and left a message that marijuana was growing inside 420 West Warren Street; that no one lives there; that a suspicious male goes to the residence periodically; and that the neighbors have smelled strange odors emanating from the property;

(m) on October 27, 2004, Officer Parsley and Detective Altieri spoke to a confidential informant who told them that he/she smelled the strong odor of "skunk weed" or "home grown" marijuana coming from 420 West Warren Street;

(n) on October 27, 2004, Officer Parsley and Detective Alfieri also spoke to another confidential informant who reported that he/she personally had seen marijuana growing inside 420 West Warren Street. This person also said that, after the police began to investigate the property in late August, the occupant appeared to clear up the overgrown weeds and also covered the windows more thoroughly so no one could see inside. The confidential informant also said the air conditioners still go on every night, even with the cold weather;

(o) both confidential informants said that the occupant only comes to the residence

periodically and that he "hasn't been seen there since last week";

4. The information provided by three anonymous informants and four different confidential informants was virtually identical and was corroborated by the police officers' own ongoing, periodic observations of 420 West Warren Street between August 31, 2004 and October 27, 2004. Given the totality of the circumstances, as seen through the eyes of a trained police officer, and according great deference to Magisterial District Judge Bernhardt's finding of probable cause, as we are required to do, this court concludes that the affidavit was sufficient to establish a fair probability that the premises were being used for a marijuana grow operation, which was ongoing on the date that the search warrant issued, October 27, 2004.

5. The information provided by four different confidential informants, all to the same effect, carried sufficient indicia of reliability. Indeed, "a known informant places himself at risk of prosecution for filing a false claim if the tip is untrue, whereas, an unknown informant faces no such risk." *Commonwealth v. Krisko*, 884 A.2d 296, at 301 (Pa. Super. 2005), citing *Commonwealth v. Jackson*, 548 Pa. 484, 490, 698 A.2d 571, 573 (1997); *Commonwealth v. Weidenmoyer*, 518 Pa. 2, 539 A.2d 1291 (1988).

6. The three anonymous tips received between August 31, 2004 and October 27, 2004, and the four confidential citizen informants served to corroborate

each other. *See Commonwealth v. Karns*, 566 A.2d 615 (Pa. Super. 1989):

"There is a low probability two independent sources would supply identical information if it were not probably accurate, and this probability produces the necessary reliability to establish probable cause." 566 A.2d at 617.

7. Contrary to the defendant's contention, the Affidavit of Probable Cause is not deficient merely because it does not state the precise date when the anonymous informants and the confidential informants came by their knowledge. Absent obvious chronological inconsistencies, the issuing authority could properly conclude that informants were speaking of the present or the immediate past. Staleness is not to be determined by rigorous exactitude where, as here, it may fairly be concluded that the criminal activity is ongoing. *See Commonwealth v. Baker*, 513 Pa. 23, 518 A.2d 802 (1986)

Here, the affidavit is sufficient to establish a fair probability that criminal activity, i.e., the marijuana grow operation, is ongoing and continued up to the time of the issuance of the warrant. In such circumstances, otherwise "stale" information remains viable. *Commonwealth v. Jones*, 542 Pa. 418, 668 A.2d 114 (1995). *See, too, Commonwealth v. Klinedinst*, 589 A.2d 1119 (Pa. Super. 1991); *Commonwealth v. Marzel*, 463 A.2d 639 (Pa. Super. 1981).

8. The Affidavit of Probable Cause for 420 West Warren Street contained no material misrepresentations and/or omissions. The defendant claims that Officer Parsley made a material omission because he failed to note that the prior arrest of the defendant for possession of a small amount of marijuana occurred eight years earlier and that the charges were ultimately *nolle prossed*. We disagree. It was appropriate to include the fact of arrest. The charges might have been *nolle prossed* for a variety of reasons. In any event, the reference to the defendant's earlier arrest for possession of a small amount of marijuana was relatively insignificant in the total context of the affidavit. Even if the arrest reference had been deleted entirely, or had the omitted information been included, the Affidavit of Probable Cause remained sufficient to support the issuance of the search warrant.

THE DEFENDANT'S ARREST AND
STATEMENT TO POLICE
ON OCTOBER 27, 2004

9. The defendant was lawfully arrested at around 10:45 p.m. on October 27, 2004, when he appeared at the premises while the police were executing the search warrant. The defendant began unlocking the door with his key and fled when he saw the police inside. The defendant ran to his car, where he was apprehended by the officers. His girlfriend, Tammy Taylor, was in the car. The defendant's challenge to his arrest and his subsequent statement was

predicated upon the contention that the search warrant for 420 West Warren Street was defective, because it was not supported by probable cause. As we have found that the search warrant was supported by probable cause and was lawful, it follows that the defendant's arrest was lawful.

10. Following the defendant's lawful arrest, he was transported to the Norristown Police Department, where he was given his Miranda warnings prior to any custodial interrogation. The defendant was given his Miranda warnings and signed his acknowledgment of the same and agreed to give a statement at 11:09 p.m. on October 27, 2004. (Exhibit C-3) The court finds that this statement was given knowingly, intelligently, and voluntarily, and that it was not the product of duress, coercion or any other improper inducements. Even before he was given his Miranda warnings, the defendant volunteered to the police that his "father was a retired Philadelphia police officer". He also told the officers "look, I'm going to cooperate with you guys. I'm not a bad guy." We credit the suppression hearing testimony of Detective Altieri over that of the defendant on the question of whether the defendant was told that if he gave a statement, the police would *not* charge his girlfriend, Tammy Taylor. We find that no such inducement was made by the detective. It was the defendant who stated that he wished to cooperate and give a statement, in the course of which he absolved Tammy Taylor of any responsibility for the marijuana grow operation. The court also finds,

crediting Detective Altieri's suppression hearing testimony over that of the defendant, that the defendant never invoked his right to counsel prior to giving the statement, consisting of two and one-half pages, before he terminated it at 11:55 p.m.

**CONSENT TO SEARCH RESIDENCE AT
2804 VILLAGE GREEN LANE, TROOPER,
LOWER PROVIDENCE TOWNSHIP**

11. At 12:29 a.m. on October 28, 2004, while the defendant was at the Norristown Police Station following his arrest, the defendant signed a consent to search form for his residence at 2804 Village Green Lane. (Exhibit C-4) The defendant did not challenge the consent to search on any basis other than the contention that the search of 420 West Warren Street, and the defendant's subsequent arrest, were illegal. As we have found that they were not, the search conducted at the defendant's residence, pursuant to the consent to search, was lawful. The consent to search form was executed knowingly, intelligently and voluntarily. Among the items seized during this search were three (3) calendars denoting different harvest dates, reasonably leading to the belief that the defendant has more than one location where he grows marijuana.

SEARCH WARRANT FOR
1202-1208 STERIGERE STREET
NORRISTOWN, PA

12. On October 29, 2004 at about 7:00 p.m., Detective Alfieri proceeded to 1208 Sterigere Street, the address shown on Otterson's driver's license. The windows and doors were all covered up (as they were at 420 West Warren Street) and newer air conditioners were in the upper windows.

13. While standing outside the front door of the residence, Detective Altieri could smell the distinctive odor of marijuana.

14. PVC pipe was seen on the side of the adjoining property, 1202 Sterigere Street, which matched the PVC pipe found inside the Warren Street property. The Warren Street property and 1202-1208 Sterigere Street were very similar in appearance. Both properties had the windows sealed up as if to conceal the contents of the interior of the residences, and had air conditioners in the windows.

15. The search warrant issued by Magisterial District Judge Albert Augustine on October 29, 2004 at 9:45 p.m. for the premises, identified as 1208 Sterigere Street, a three-story white stucco home, was lawful, as it was based upon probable cause to believe that an additional marijuana grow operation was in progress at that location. The Affidavit of Probable Cause by Detective Michael Altieri (Exhibit C-2) may be summarized as follows:

(a) the search of premises at 420 West Warren Street, starting at 8:45 p.m. on October 27, 2004, revealed a large-scale marijuana growing operation conducted by the defendant;

(b) the defendant gave a statement admitting his marijuana growing operation;

(c) the defendant consented to a search of his residence at 1208 Village Green Lane, and the search was conducted at approximately 1:00 a.m. on October 29, 2004. Among the items seized were three (3) calendars denoting different harvest dates, leading to the belief that the defendant has more than one location where he grows marijuana;

(d) on October 29, 2004 at about 7:00 p.m., Detective Altieri proceeded to 1208 Sterigere Street, the address shown on Otterson's driver's license. The windows and doors were all covered up (as they were at 420 West Warren Street) and newer air conditioners were in the upper windows. One of Otterson's keys, taken from him at the time of his arrest, opened the front door; but the police did not enter until they had obtained a search warrant;

(e) while standing at the front door of the residence, Detective Altieri could smell the distinctive odor of marijuana. The property was not enclosed by a fence or any other barrier. Detective Altieri was lawfully in a position, standing outside at the front door of the property, where he detected the odor of

marijuana emanating from within. This alone provided sufficient probable cause to search the Sterigere Street property. **Commonwealth v. Stainbrook**, 471 A.2d 1223 (Pa. Super. 1984). *See, also, Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74, at 82 (1987) (McDermott, J. concurring):

"[I]f one cannot contain the odor of their business from seeping into the public domain, they have betrayed their secret. If the odor proves the nature of the substance, and that substance is illegal contraband, there is probable cause for a warrant. If the smeller, whether it is an experienced man, machine, trained dog, pig, or canary, can say upon training or experience that such an odor emanates from an illegal substance, the warrant should issue."

(f) defendant, Otterson, had no reasonable expectation of privacy that society is prepared to recognize that the odor of a large marijuana growing operation could not be detected by a person familiar with the odor of marijuana standing outside the front door of the Sterigere Street property. Detective Altieri's entry into the curtilage was reasonable under the totality of the circumstances presented here. *See Commonwealth v. Askins*, 761 A.2d 601, 604 (Pa. Super. 2000) ("Appellant had no subjective expectation of privacy interest in the front porch of her home."); **Commonwealth v. Gibson**, 536 Pa.

123, 638 A.2d 203 (1994); and **Commonwealth v. Carelli**, 546 A.2d 1185, 1197 (Pa. Super. 1988) ("Thus, we find that even assuming, *arguendo*, that Officer Casciola trespassed in the curtilage and looked deliberately into a private area (the interior of the garage), his presence in front of the garage door was nonetheless reasonable and his view of the stolen truck was constitutional under the circumstances of this case.")

CONCLUSIONS OF LAW

1. The search warrant for 420 West Warren Street, Norristown, PA was supported by probable cause that a marijuana growing operation was then and there ongoing. The evidence seized upon execution of the search warrant on October 27, 2004 is admissible.
2. The defendant was lawfully arrested on October 27, 2004 when he appeared and began to enter 420 West Warren Street with a key while the police were in the process of executing the search warrant. After the defendant attempted to flee from the police, he was arrested. Items seized from his person incident to his lawful arrest are admissible.
3. The defendant's statement to the police following his arrest and after he was advised of his Miranda warnings, consisting of two and one-half pages, (Exhibit C-3) is admissible.

4. The evidence seized from the defendant's residence at 2804 Village Green Lane, Trooper, PA, pursuant to the consent to search (Exhibit C-4) is admissible.

5. The evidence seized pursuant to the search warrant issued by Magisterial District Judge Augustine for property at 1202-1208 Sterigere Street, Norristown, PA, is admissible.

BY THE COURT:

/s/ William T. Nicholas
WILLIAM T. NICHOLAS, J.

Copy of the above Order to the following

On: 12/5/05

By First Class Mail:

Thomas C. Egan, Esquire

By Interoffice Mail:

District Attorney, Attn: Robert Sander, Esquire

District Attorney, Attn: Nicole McCauley, Esquire

Adult Probation

Denise Vicario, Esquire, Court Administration

By: /s/ Alice I. Arena
Alice I. Arena
Secretary

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

**COMMONWEALTH OF
PENNSYLVANIA,**

Respondent

v.

PATRICK H. OTTERSON,

Petitioner

: No. 312 MAL 2008
: Petition for Allowance
: of Appeal from
: the Order of the
: Superior Court
:
:
:

ORDER

PER CURIAM

AND NOW, this 7th day of October 2008, the Petition for Allowance of Appeal is DENIED.

TRUE & CORRECT COPY

ATTEST: October 7, 2008

/s/ Elizabeth Zisk

Elizabeth Zisk, Chief Clerk

130

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No. 08-1195

FILED

JUN 16 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

◆◆◆◆◆
PATRICK H. OTTERSON,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

◆◆◆◆◆
**On Petition For A Writ Of Certiorari
To The Superior Court Of Pennsylvania**

◆◆◆◆◆ **PETITION FOR REHEARING**

◆◆◆◆◆
PATRICK H. OTTERSON, Pro-se
Prison No. GS-7641
SCI Coal Township
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570-644-7890

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STATEMENT OF REASONS TO GRANT REHEARING

THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT REHEARING TO REVIEW PETITIONER'S CLAIM THAT THE SUPERIOR COURT OF PENNSYLVANIA ERRED BY NOT FOLLOWING THE INSTRUCTION OF THE SUPREME COURT OF PENNSYLVANIA ON REMAND AND AGAIN AFFIRMED THE COURT OF COMMON PLEAS' DECISION REFUSING TO GRANT PETITIONER'S MOTION TO SUPPRESS EVIDENCE BASED UPON A RESIDENTIAL SEARCH WARRANT THAT LACKED PROBABLE CAUSE UNDER THE REQUIREMENTS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS SET FORTH BY THE UNITED STATES SUPREME COURT IN *ILLINOIS V. GATES*, 462 U.S. 213 (1983).

Petitioner has contended that the search warrant issued for Warren Street was not supported by sufficient probable cause as it was based upon anonymous sources with no record of previous reliability, whose accusations were not corroborated by police investigation except as to non-criminal general facts. The unidentified informants in the Affidavit did not even establish how they would have acquired their knowledge of these observations. Therefore the seizures should have been suppressed as well as the subsequent warrant issued for Sterigere Street, which was fruit of the poisonous tree.

The Superior Court of Pennsylvania decided this matter in a manner which conflicts with the standards set forth in the Fourth Amendment to the United States Constitution. The anonymous tips in the Warren Street Affidavit do not meet the basis of knowledge, veracity, or reliability requirements established under *Illinois v. Gates*.

In the first round of appellate review the Superior Court provided no analysis at all of Petitioner's claim that the search warrant for Warren Street was constitutionally deficient in that it lacked probable cause to support its issuance under *Illinois v. Gates*. In the 2 to 1 decision, the Superior Court merely adopted the reasoning of the Suppression Court that the anonymous tips corroborated each other.

Judge Popovich, Senior Judge of the Superior Court, wrote a dissenting opinion where he found the anonymous tips presented information that was substantially similar and could have been obtained easily by the police and were not sufficient to form the basis for a warrant. He rejected the Commonwealth's argument that the tips from the anonymous sources could have provided self-corroboration. Judge Popovich reasoned that the four corners of the Affidavit for Warren Street failed to sufficiently demonstrate that the anonymous sources had a basis of knowledge regarding the Petitioner's alleged criminal activity inside that location and also failed to establish their reliability. He found that the only facts corroborated by the police via their investigation were as follows: (1) Petitioner was not present at the Warren Street

property during their investigation, despite his status as lessee of the property; (2) the air conditioners and lights were on continuously, despite Petitioner's absence; (3) the windows were covered; and (4) the Warren Street property was locked. He concluded that those facts were non-criminal in nature and do not establish a probability that Petitioner was engaged in a marijuana growing operation. Petitioner is confident that if this petition for rehearing is granted the Supreme Court of the United States will conclude, just as Judge Popovich did, that the search at Warren Street was unlawful and the subsequent search at Sterigere Street was tainted by that primary illegality leading this Honorable Court to reverse the Superior Court and suppress all evidence obtained from the searches.

The Supreme Court of Pennsylvania vacated the decision of the Superior Court and remanded the matter back to the Superior Court for consideration in light of *Commonwealth v. Torres*, 764 A.2d 532 (Pa. 2001). In *Torres* the affidavit failed to make a showing of the reliability of the information the anonymous sources relayed to the police to support a finding of probable cause under *Illinois v. Gates*. The Court noted that limited corroboration of general information provided by the informants was not enough to sustain the warrants.

The Superior Court's new opinion authored by Judge Lally-Green no longer relied on the Suppression Court's decision that the anonymous tips corroborated each other. Judge Lally-Green now reasoned that the instant case differs from *Torres* in that the Affidavit

for Warren Street specifically provided information regarding the basis of the anonymous sources' knowledge and that the veracity of the sources' information was corroborated by independent police investigation.

Petitioner respectfully disagrees and submits that a fair and objective review of the Affidavit in support of this search warrant establishes that probable cause was not presented within the four corners of the Affidavit. The ruling of the Superior Court cannot stand under *Illinois v. Gates* and *Commonwealth v. Torres*. As was the case in *Torres*, here too, the police have relied upon unnamed, unidentified, and anonymous or confidential sources who satisfy neither the basis of knowledge nor reliability requirements under *Gates* and *Torres*. There was no information presented that qualified the sources veracity, reliability, or their competence to know what marijuana looks and smells like. The tips provided no predictive conduct or information that would provide police with means to test the informants knowledge or credibility as the tip in *Gates* provided. The informants do not give a detailed description of the alleged marijuana growing. There were no accounts of marijuana use or sales. The sources did not even know the occupant's name or any other address associated with him. The police did not corroborate any allegations of criminal activity. All the police had to rely on were bare reports from unknown, unaccountable informants who neither explained how or when they made their observations nor supplied any basis for believing they had inside information.

The only information that the police investigation revealed was that the occupant was not at the property during their many periodic checks, the air conditioners and lights were on continuously, the windows were covered by the complete closing of blinds and curtains and the doors were locked. Notwithstanding the locked doors, this information could be observed from the "public" sidewalk or street. These general observations were publicly available and non-criminal in nature.

The police investigation failed to corroborate that the occupant was a white male or that he owned or operated a silver pick-up truck, even with their access to governmental records, which was information presented to the police. The police did not associate the occupant with any other address except the one on Warren Street. The police did not corroborate that somebody comes to pick up the mail, which is delivered every day excluding Sunday, or that the occupant removes trash bags at night. The police did not see anyone coming from or going to the property, yet there was supposedly a marijuana growing operation going on at the property. The police do not corroborate that the air conditioning units and lights are operating on a timer, only that they are continuously on. It is not corroborated by the police that the odor of marijuana existed or that marijuana could be seen growing on the first floor. In fact, it was not confirmed that marijuana was growing or that it was ever growing on the first floor after the warrant was executed. The police failed to establish, through a thermal search, the existence of high powered

hydroponic lamps or that there was an excessive amount of electricity being drawn at the property.

In the "Conclusion" on page 9 of the Affidavit the affiant, Officer Parsley, states, "as an experienced Narcotics Detective, Detective Altieri is aware that if a person was to cultivate marijuana in a residence, they would need hydroponic lights, which would draw excessive electricity for them to operate. These high-powered lamps would create an excessive heat source to radiate inside the residence." However, there is no information whatsoever in the Affidavit to support these statements.

Our Founding Fathers were pioneers in establishing a country that protected human liberty, our United States. They used their experience as leaders to solve as well as prevent the problems that existed and plagued governments throughout history. When writing the United States Constitution, the foundation of our United States Government, they did so with much foresight in creating a government that would not be so powerful as to remove the power from the people to ensure a successful country for future generations.

The Fourth Amendment to the United States Constitution was written by design and the purpose was to deter government intrusion and police misconduct by keeping its citizens safe in their persons, houses, papers, and effects from unreasonable searches and seizures without just probable cause.

The United States Constitution borrowed from many of the original 13 colonies that had already adopted their own constitutions. Pennsylvania's Constitution was adopted on September 28, 1776, a full ten years prior to the ratification of the United States Constitution. The requirement of probable cause traces its origin to Pennsylvania's original Constitution of 1776. The primary purpose of the warrant requirement was to abolish "general warrants," which had been used by the British to conduct sweeping searches of residences and businesses based upon generalized suspicions. The issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen.

The Supreme Court cannot allow our police to conduct searches and seizures on the grounds of accusations without any police corroboration where the basis of knowledge and veracity of anonymous sources is not established and there is no showing of the reliability of the information that the sources relayed to the police.

**REHEARING SHOULD BE GRANTED
TO RESOLVE THIS FUNDAMENTAL
CONSTITUTIONAL ISSUE OF
GREAT PUBLIC IMPORTANCE**

After the Superior Court once again affirmed the Court of Common Pleas' decision refusing to grant Petitioner's Motion to Suppress Evidence, Petitioner

filed for another Allowance of Appeal with the Supreme Court of Pennsylvania but that Court declined review. Petitioner respectfully notes for this Court that under *Stone v. Powell*, 428 U.S. 465 (1976), a claim that Petitioner's rights under the Fourth Amendment have been violated will not be entertained on federal habeas corpus review. Therefore, the United States Supreme Court is the only opportunity to have a court consider the merits of his suppression claim. Petitioner filed a Petition for a Writ of Certiorari with the United States Supreme Court which was denied on May 18, 2009. This Petition For Rehearing is the final opportunity to resolve this important Constitutional issue and it should be settled by this Honorable Court.

CONCLUSION

For all the reasons expressed herein, as well as in view of the argument set forth in Petitioner's Petition for a Writ of Certiorari filed with this Court on March 26, 2009. Petitioner respectfully requests that this Honorable Court exercise its sound judicial discretion and grant this Petition for Rehearing and allow further review of the ruling of the Superior Court of Pennsylvania because there are special and important reasons that justify the grant of relief to Petitioner, particularly that the Superior Court has decided this issue in a manner that conflicts with the requirements of probable cause under the Fourth

Amendment to the United States Constitution as set forth by the United States Supreme Court in *Illinois v. Gates*.

Respectfully submitted,
PATRICK H. OTTERSON

CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

PATRICK H. OTTERSON